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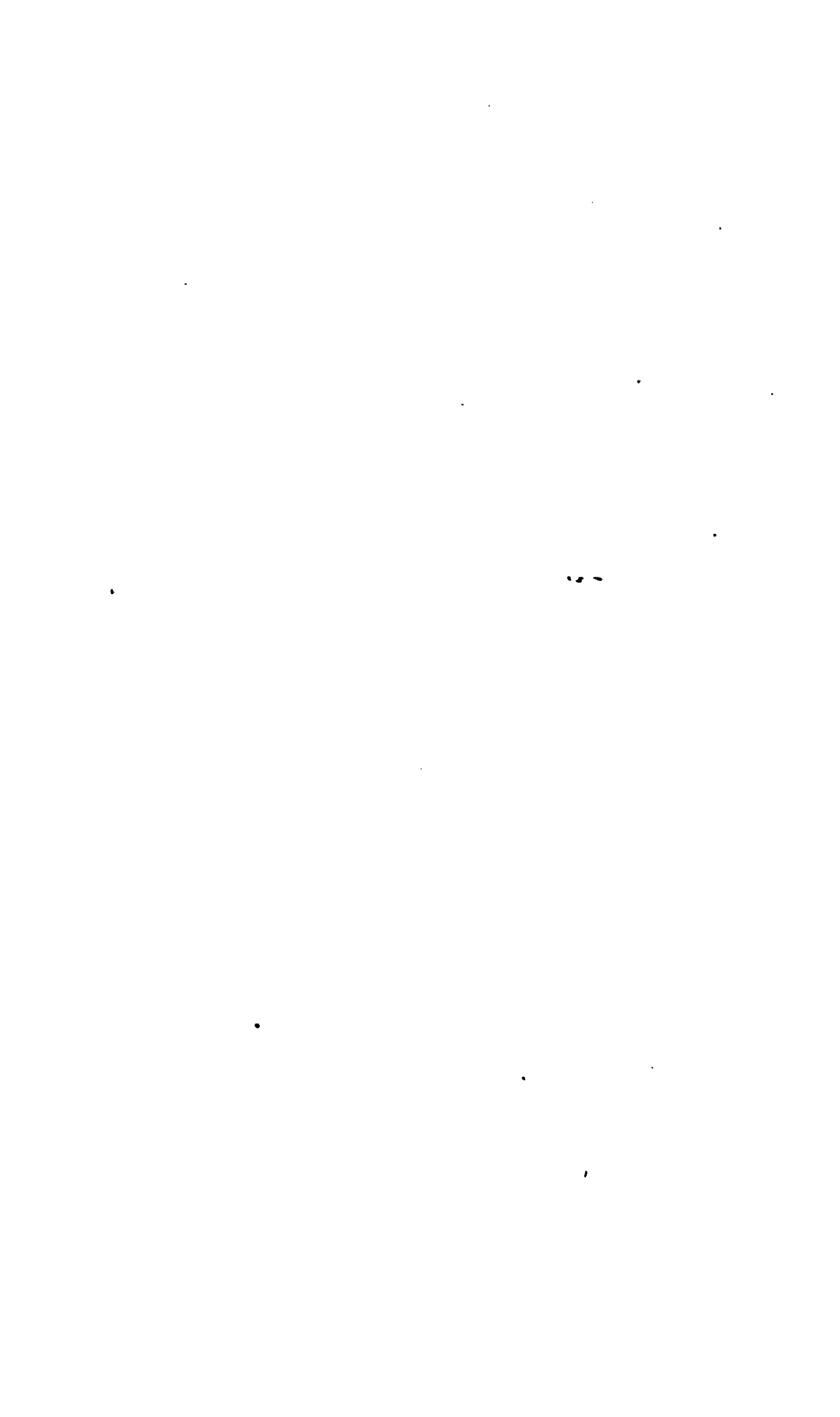




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REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

HIGH COURT OF CHANCERY,

DURING THE TIME OF

Lord Chancellor Eldon.

BY EDWARD JACOB AND JOHN WALKER,
OF LINCOLN'S INN, ESQRS. BARRISTERS AT LAW.

VOL. II.

1820, 1821, 1 & 2 GEO. IV.

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LORD ELDON, *Lord High Chancellor.*

SIR THOMAS PLUMER, *Master of the Rolls.*

SIR JOHN LEACH, *Vice-Chancellor of England.*

SIR ROBERT GIFFORD, *Attorney-General.*

SIR J.S. COPLEY, *Solicitor-General.*



TABLE

CASES REPORTED

IN THIS VOLUME.

| A | | Page |
|---------------------------------|-----|--|
| Anonymous | 553 | Boehm v. Wood 236 |
| Askew, Osbaldiston v. | 539 | Brace v. Ormond 435 |
| Attorney-General v. Earl of | | Brackenbury v. Brackenbury 391 |
| Belfast | 439 | Brasier, Lechmere v. 287 |
| Attorney-General v. Berkeley | 291 | Bristol, Mayor of, Attorney-General v. 294 |
| Attorney-General v. Martley | 368 | Broadbent, Ritchie v. 456 |
| Attorney-General v. Hinxman | 270 | Bromley's Case 453 |
| Attorney-General v. Mayor of | | Butcher, Cecil v. 565 |
| Bristol | 294 | |
| B | | C |
| Belfast, Earl of, v. Chichester | | Calvert, Blaydes v. 211 |
| and the Attorney-General | 439 | Cecil v. Butcher 565 |
| Bell, Lespinasse v. | 436 | Chichester, Earl of Belfast v. 439 |
| Berkeley, Attorney-General v. | 291 | Cholmondeley, Marquis of, v. Earl of Clinton 1 |
| Bignold, Ellison v. | 503 | Christophers v. Sparke 223 |
| Bland v. Lamb | 399 | Clinton, Earl of, Marquis of Cholmondeley v. 1 |
| Blaydes v. Calvert | 211 | |

ERRATA.

- Page 2. line 38. in margin, for "the," read "that."
81. line 22. in margin, for "of," read "or."
133. line 18. for "of," read "and."
292. line 14. *del* "title."
— line 20. for "ninety one," read "ninety nine."

REPORTS

OF

CASES

ARGUED & DETERMINED

1820.

IN THE

HIGH COURT OF CHANCERY,

Commencing in the Sittings before

EASTER TERM,

1 Geo. IV. 1820.

Between MARQUIS CHOLMONDELEY and the
HONOURABLE ANN SEYMOUR DAMER,

PLAINTIFFS.

Rolls.
March 10. 15,
14, 15, 16, 17.
July 5, 6.
Aug. 8. 16

And LORD CLINTON, FRANCIS DRAKE, AM-
BROSE ST. JOHN, JOHN INGLETT FOR-
TESCUE, SIR LAWRENCE PALK (deceased),
SIR JAMES AFFLECK, JOHN SAWYER, and
WILLIAM SEYMOUR, DEFENDANTS.

AND

Between the same Plaintiffs,

And SIR LAWRENCE VAUGHAN PALK (an
Infant), DAME DOROTHY ELIZABETH PALK,
SIR THOMAS TYRWHITT, and the EARL of
SHAFTESBURY, DEFENDANTS.

AFTER the original hearing of this cause reported
in 2 Mer. p. 171., a case was sent for the opinion
of the Judges of the Court of King's Bench, in which

A, in a con-
veyance to
uses, reciting
that he was
desirous that
certain estates

VOL. II.

Lords 11
Hayes
Cattin
151

Stads — } 24/10/6
Quartermen } 259
Stringer — } 75/10/6

the

1820.

Marquis
CHOLMON-
DELEY
v.
Lord
CLINTON.

the question was, whether *Robert George William Trefusis*, afterwards Lord Clinton, the father of the Defendant Lord Clinton, took any estate under the deed of the 2d day of August 1781.

derived from his mother's family, should remain in the family and blood of *S. R.*, his maternal grandfather, in consideration of his natural love and affection to his relations, the heirs of *S. R.*, and to the intent that the said estates might continue in the family and blood of his late mother, on the side of her father, settles them to the use of himself for life, remainder to the heirs of his body; for

The case was twice argued in the Court of King's Bench; first by Mr. *Richardson* for the Plaintiffs, and Mr. *Preston* for the Defendants; and afterwards by Mr. *Shadwell* for the Plaintiffs, and Mr. Serjeant *Copley* for the Defendants. The arguments are reported in 2 *Barn. & Ald.* 625.

The following certificates were sent by the Judges.

"This case has been argued before us by counsel; and considering that the words "the right heirs of *Samuel Rolle*," are words of plain and well-known import, and according to that import must denote *George Earl of Orford* the settlor, we think that *Robert George William Trefusis*, afterwards Lord Clinton, took no estate under the said indenture of the 2d of August 1781. Supposing a different construction might be put upon those words in a deed, and that they might be held to designate some other persons, in order to carry into effect a manifest intention on the part of the settlor, yet we do not collect with certainty from the language of the deed, what

default of such issue as he should appoint, and for default of appointment to the use of the right heirs of *S. R.*, with a power of revocation and new appointment. The ultimate remainder is *contingent*, and will vest in the person who happens to be the right heir of *S. R.*, at the expiration of the estates previously limited.

An estate subject to a mortgage in fee, being in settlement with an ultimate limitation to the right heirs of *S. R.*; *A.*, on the expiration of the previous estate, enters claiming to be entitled under the limitation, and he, and after his death his son, continue in quiet possession, paying interest on the mortgage, for 20 years. The devisee of the person really entitled under the limitation is barred by the length of time.

In a suit concerning the inheritance of a trust estate, settled on Baron *C.* for life, and after remainders to his unborn children, upon the person who should then be entitled to claim as Baron *C.* in tail; with an ultimate remainder to the present Baron *C.* in fee; the person presumptively entitled to the barony, although no person entitled to a prior estate of inheritance is before the Court, is not a necessary party.

Two estates being mortgaged together, on the death of the mortgagee, the equity of redemption of the one devolves on *A.*, that of the other on *B.*; *B.* is a necessary party to a bill by *A.* for a redemption.

other

other person the settlor intended to designate by those words.

"C. ABBOTT.

"G. S. HOLROYD.

"M. D. BEST."

1820.
Marquis
Cecilia-
BLEY
v.
Lord
CLINTON.

"This case has been twice argued; and considering that it appears by the indenture of the 9d of August 1781, that the said *George Earl of Orford* knew himself to be the then heir of *Samuel Rolle*: considering also that during the life of the said *George Earl of Orford*, or so long as there should be any issue of his body, no person could legally come within the description of right heir of *Samuel Rolle* but the said *George Earl of Orford*, and his issue, who were of the united line of *Walpole* and *Rolle*, and were also provided for by the estate tail, created by the indenture; considering also that it appears plainly, by that indenture, that the said *George Earl of Orford* meant to provide for the separate line of *Rolle*, that no person of that separate line could come within the description of right heir of *Samuel Rolle*, till the united line should be exhausted, and that a limitation, by way of remainder to heirs or children, is not necessarily confined to such persons as are within that description at the time the limitation is created: I am of opinion that the effect of the indenture of the 9d August 1781, was to vest in the said *George Earl of Orford*, an estate in tail general, with remainder (if he should make no appointment) to such person as, at the expiration of the estate tail, should be the right heir of *Samuel Rolle* in fee; and consequently that the said *Robert George William Trefusis* took an estate in fee under the said indenture.

"J. BAYLEY."

The cause now came on for hearing on the equity reserved. Two objections for want of parties were taken. The discussion they gave rise to, which took place at

1820.

Marquis
CHOLMON-
DELEY
v.
Lord
CLINTON.

the close of the arguments for the Defendants, is for the sake of order inserted in this place. The Master of the Rolls reserved his opinion on them till the delivery of his judgment.

The first objection was, that the brothers and sisters of the Defendant Lord *Clinton*, or the eldest brother, were not made parties.

By indentures of the 7th and 8th *October* 1792 (a), *R. G. W. Trefusis*, afterwards Lord *Clinton*, settled the estates in question to the use of himself for life, with remainder (subject to a jointure and certain trust terms) to the use of his eldest son, *R. C. St. John Trefusis* (the Defendant Lord *Clinton*) for his life, with remainder to trustees to preserve, &c. with remainder to the son of his (the Defendant's) first and other sons successively in tail male, with remainder to the use of his first and other daughters successively in tail male, with remainder to the use of the heirs of his body, with other remainders over. *R. G. W. Lord Clinton* died in 1797; his son, the Defendant Lord *Clinton*, suffered recoveries, and by indentures dated the 25th and 26th *November* 1809, and the 15th and 16th *December* 1809, the estates in question were settled, subject to a term of 99 years, to the use and intent to give effect to the estate for life of the Defendant Lord *Clinton*, and the other uses and estates limited by the indentures of the 7th and 8th *October* 1792, prior to the estates thereby limited to the Defendant Lord *Clinton* in tail; with remainder to trustees in fee; and it was declared, that after the determination of the life-estate of the Defendant Lord *Clinton*, and the estates tail limited to his sons and daughters, the estates should be held by the trustees for a term of 100 years from the date of the indentures,

(a) 2 *Mer.* 179.

determinable on the lives of several persons therein mentioned; and after the expiration or sooner determination of the term, in trust for the person who should be entitled to claim to be a peer or peeress of the realm, under the title or dignity then possessed by the Defendant *Lord Clinton*, of Baron or Baroness *Clinton*, and to the heirs of the body of that person; with remainder in trust for the person answering the description of heir of the body of *Samuel Trefusis*, Esq. the great-great-grandfather of the Defendant *Lord Clinton*, and the heirs of the body of that person; with remainder in trust for the Defendant *Lord Clinton* in fee. The trusts of the term of 100 years were declared to be, to permit the person presumptively entitled to the first vested estate of inheritance, to receive the rents and profits for a term of 80 years, if such person should so long live, so that such person might have a chattel interest. The Defendant *Lord Clinton* had no children; his brother *Mr. Trefusis* was the heir presumptive to the peerage.

Mr. Benyon and *Mr. Blake*, in support of the objection.

The effect of the settlement is to vest the estate in *Lord Clinton*'s successor in the peerage. *Lord Clinton* has only a life-estate, and a remote remainder. There is not any estate of inheritance before the Court precedent to these limitations, and therefore, according to the general rule, the person who may become entitled to take under them, will not be bound by any decree made in the present state of the pleadings. If a decree were made now, and *Lord Clinton* were to die tomorrow, his brother would become entitled, and a new suit must be instituted. Those who may become entitled, or at all events *Mr. Trefusis*, the person in whom the property would vest, if the previous estates

1820.
 Marquis
 CHOLMON-
 DELEY
 2.
 Lord
 CLINTON.

1820.

Marquis
Chalmers-
Deley
v.
Lord
Clinton.

were to determine at this moment, should be parties. That persons having contingent interests must be parties, appears from a case reported in 16 *Vin. Ab.* 288. pl. 64., and in 12 *Mod.* 560., where there was a devise of land in trust for two young ladies, and if they died within age, and before marriage, remainder over. They brought a bill for the execution of the trusts, and it was dismissed for want of making the remainder-man a party. The interest of Lord Clinton's brothers and sisters are possibilities. The only question is, have they such interests as the Court can bind by decree? either of them might levy a fine, which, in the event of the limitation vesting in him, would bind him and his issue by estoppel. In the same manner they would be bound by the decree, and therefore they ought to be included in the suit.

Mr. Shadwell and *Mr. Sugden* on the other side.

If there be a person named, who has a contingent estate limited to him, which may take effect prior to the vesting of the first estate of inheritance, he ought to be a party to any bill that seeks to bind the inheritance. But when the limitation is to an unascertained person, described only as being of a class that may be innumerable, it is not necessary to make them parties; in most cases it would not be possible. If it was a gift to all the peers of England at a certain period, who would be the proper parties to a bill? It is like a limitation to the heirs of a living person. Even if all the persons capable of taking at the time be included, that will be of no avail, for you cannot be certain that you have before the Court him who will be ultimately entitled; he may not yet be *in esse*. A tenant in tail is made a party to defend those who stand behind him, as well as his own interest; and they are therefore bound by the decree against him. But that
cannot

CASES IN CHANCERY.

7

cannot be the case here, as these persons claim independently, and may never become entitled. Besides, their rights are not successive. Contingent remainders, when the person to take is ascertained, are devisable. *Roe v. Jones.* (a) But the contrary has been lately decided in the King's Bench, where the person is uncertain. *Doe d. Calkin v. Tomkinson.* (b) In the case in *Viner*, there was an executory devise to an individual who was named. Here there is a contingent remainder to a person not ascertained: the consequence is, that the fee results to Lord *Clinton* in the meantime, and we have, therefore, now before the Court the person entitled to the inheritance.

1828.

 Marquis
 Gholmon.
 DELEY
 &
 Lord
 CLINTON.

Mr. *Benyon*, in reply, observed, that the case in *Viner* was decided at a time when contingent interests were held not to be devisable. It could not, therefore, be of any consequence, with reference to the question of parties, whether the interest was or was not capable of being devised.

The second objection was, that the persons entitled to the equity of redemption of certain estates, formerly belonging to *George Lord Orford*, in the county of *Dorset*, and which were included with the estates in question in the cause, in the mortgage made in 1785 to Sir *E. Hughes*, were not made parties.

Mr. *Longley* in support of the objection.

George Lord Orford was possessed of estates in the counties of *Devon* and *Cornwall*, and of others in the county of *Dorset*. The former, which had descended to him from the *Rolle* family, were comprised in the deed

(a) 1 H. Blac. 30.

(b) 2 Maule & Sel. 165.

1820.
 Marquis
 CHOLMON-
 DELEY
 v.
 Lord
 CLINTON.

of *August* 1781; the latter were settled by other deeds, dated in *September* in the same year. The estates in all the three counties were included in the mortgage to Sir *Edward Hughes*. Afterwards, on the death of *George Lord Orford*, the *Dorsetshire* estates passed to his uncle, *Horace Lord Orford*, and have since continued in the *Walpole* family; the others form the subject of the present suit. The bill seeks a redemption of the mortgage; the mortgage rides over both estates, and therefore the owners of both are interested in the account, and must be parties to it. If they redeem at all, they must redeem the whole, and the practice is, in redeeming prior incumbrances, to have the mortgagors before the Court. They are claiming the legal estate of *Mr. Drake*, who is liable to be called upon for the same purpose by the owners of the *Dorsetshire* estates; those claims ought to be adjusted in one suit. These points were decided by the late Master of the Rolls, in *Palk v. Clinton*, (a) a case arising upon the same estates. There *Sir L. Palk*, who had the second mortgage on the *Devon* and *Cornwall* estates, desired to redeem the mortgage that is now vested in *Drake*; but as that mortgage included the *Dorset* estate also, it was held that the owner of that estate must be a party, upon the ground of his being interested in the account; a reason which equally applies here.

Mr. Shadwell and *Mr. Sugden* on the other side.

The bill only prays a redemption of the *Devon* and *Cornwall* estates; it prays a conveyance of the said mortgaged hereditaments, which refers only to those estates; for there is not any statement in the bill that *Lord Orford* had any property in the county of *Dorset*; it only appears by some general words contained in the statement of the mortgage deed of 1785. The suit is

(a) 12 Ves. 48.

confined to the *Devon* and *Cornwall* estates; and if the account be taken, it will settle every question between the Plaintiffs and Defendants. *Palk v. Clinton* was very different. The bill was by a subsequent incumbrancer, and sought to compel payment by means of a sale; that part of the prayer was abandoned, and then it was desired to have a redemption of the whole, which would have given the plaintiff a right to a foreclosure against Mr. *Walpole*. The Master of the Rolls says, "The Plaintiff insists that he has a right to redeem the whole of Lady *Hughes's* mortgage; not only so far as it affects the estate of Lord *Clinton*, the Plaintiff's mortgagor, but also as it affects the estate of Mr. *Walpole*." The decision turned on this; the distinction is, that we do not pray a redemption of the whole, but only so far as to exonerate the *Devon* and *Cornwall* estates. (a)

1820.
Marquis
CHOLMON
DELEY
v.
Lord
CLINTON.

Mr. *Shadwell*, Mr. *Sugden*, and Mr. *Brent* (in the absence of the Attorney General) stated the case for the Plaintiffs, and relied on the judgment pronounced by the late Master of the Rolls, and the certificate of the three Judges of the Court of King's Bench.

Mr. *Bell*, Mr. *Heald*, (b) and Mr. *Pepys* for the Defendant Lord *Clinton*.

(a) In *Ireson v. Denn*, 2 Cox, 425. two estates were mortgaged for distinct debts to the same person. The mortgagor afterwards sold the equity of redemption of one of them. On a bill by the purchaser to redeem that estate, it was held, that he must at the same time redeem the other; and that, for that purpose, he must make the persons entitled to the equity of redemption of it parties.

(b) Mr. *Butler*, who also appeared as one of the counsel for Lord *Clinton*, having adopted a line of reasoning somewhat different from that which had been hitherto pursued, a separate analysis of the arguments which were urged by him has been inserted and will be found in a subsequent page.

Mr. *Benyon*

1820.

Marquis
CHOLMON-
DELEY
v.
Lord
CLINTON.

Mr. Bemyon and Mr. Blake for the Defendants *St. John* and *Fortescue*.

Mr. Hart, Mr. Harne, and Mr. Langley for the representatives of Sir *L. Palk*.

I. The first question is on the construction of the limitation "to the use of the right heirs of *Samuel Rolle*; words sufficiently distinct, if we can fix the period to which the description refers. The simple point is, whether it designates the right heir at the date of the deed, or at the time of the determination of the previous estates; it is a question between *now* and *then*. It has been contended on the other side that some rule of law fixes so inflexible an import upon the words "right heirs," that he who uses them cannot be understood to mean any but the right heir at the time of making the deed. The cases cited in support of this position, are either those falling within the rule in *Shelley's* case, which are not applicable here; or those of limitations to the right heirs of the grantor, which standing uncontroulled, leave the old reversion in himself. They would be similar to the present, if the limitations had been to the right heirs of *George Lord Orford*; but the limitation is to the right heirs of another person. There is a previous limitation to the heirs of the body of *George Lord Orford*; would he afterwards have spoken of the heirs of *S. Rolle*, if he had meant the heirs of the same person? When we find that *Lord Orford* was himself the right heir of *S. Rolle*, an apparent inconsistency is introduced into the limitations, which can only be reconciled by having recourse to the recitals.

In the case cited from *Co. Lit.* 26. b. (a), there were no *indictæ* of intention to show the Court how to deal

(a) 2 *Mer.* 224.

with the limitation, and therefore the construction that took in the largest class of heirs was adopted. In *Doe d. Bailey v. Pugh* (a), a devise "to my right heirs, my son excepted," was held void for uncertainty; but it was only because there was no clue to ascertain who the testator intended to designate as his right heirs. It was not explained by other parts of the will. Another case was cited in the judgment of Sir *W. Grant*, by the name of *Seymour v. Boreman* (b), which seems to be the same as *Seymour Bowman v. Yate*; which is mentioned as a case where the Court, in construing a marriage-settlement, was enabled by virtue of the contract to put an unusual meaning on the word "heirs;" but on that point it is not entitled to much authority, for though a court of equity may correct a deed according to a previous contract, yet it must construe it in the same manner as a court of law; and therefore if the Plaintiff was entitled on the construction of the deed, he had a remedy at law. But in fact the case rested on another branch of equitable jurisdiction, namely, confusion of boundaries. As far as it turned upon the limitation, it is an authority in favour of a liberal construction, and was cited for that purpose in the former argument. (c)

1820.
Marquis
CHOLMON-
DELBY
v.
Lord
CLINTON.

We contend that it is the intention, as collected from every part of the deed, that is to govern the construction. We are not, because three or four words have a plain and well-known legal import, to decide at once, excluding from consideration the manifestations of intention in

(a) *Fearne*, App. 573. 3 Bro. P. C. ed. Toml. 454. 2 Mer. 348.

(b) 2 Mer. 547. The best report of this case is in 1 Ch. Ca. 145., where it is cited in argument in the case of *Davy v. Davy*. It is also in *Nelson's Ch. Rep.* p. 121., (where the latter case is given under the name of *Darcy v. Darcy*), and in 14 Vin. Ab. 244. The statement in 1 Ch. Ca. 145. coincides closely with that in the Register's book. A. 1659. fo. 291. — A. 1660. fo. 256.

(c) 2 Mer. 280.

other

1820.

Marquis
Cuthbertson
v.
Lord
Clinton.

other parts of the instrument. See *Touchstone*, p. 86., *Dormer v. Parkhurst*. (a) *Doran v. Ross*. (b) *Woodcock v. Duke of Dorset*. (c) *Hodgson v. Bussey*. (d) *Lisle v. Gray*. (e) *Spark v. Spark*. (f) *Cranmer's Case*. (g) *Wright v. Kemp*. (h) *Waker v. Snowe*. (i) Some of them, it may be said, are cases upon wills; but so far as this is a question of intention, they apply to this case, and more closely, when we consider that this is a conveyance to uses, which is entitled to a less strict construction than a common-law instrument. *Fisher v. Wigg*. (k) *Rigden v. Vallier*. (l) *Goodtitle v. Stokes*. (m) *Leigh v. Brace*. (n) In *Tapner v. Merlott* (o), Lord C. J. Willes, though he quarrels with the extent to which the doctrine had been carried in some of these cases, furnishes an authority in support of it: for where there was a limitation to the use of the heirs and assigns of S. F., he thought that the word "assigns" which in a common-law conveyance could have no operation, might in a deed to uses, in order to effectuate the intent, confer upon S. F. a power of appointment.

The word "heirs" may be used to designate either of several classes of heirs; the heirs, whether general or special, lineal or collateral, *ex parte paterná* or *ex parte materná*, are included under the same general terms. So the word "heirs" does not by itself imply a reference to any particular time; it applies equally to past, present, and future heirs; and though in general, when used without any thing else to qualify it, it is considered to mean the present heirs, that is not from any peculiar

(a) *Willes*, 322.

(b) 3 Bro. C. C. 27. 1 Ves. jun. 87.

(c) 3 Bro. C. C. 569.

(d) 2 Atk. 89.

(e) 2 Jones, 114. 2 Lev. 225.

(f) *Cro. Eliz.* 666.(g) *Dyer*, 309.

(h) 5 T. R. 473.

(i) *Palm.* 359.

(k) 1 P. W. 14.

(l) 2 Ves. 557. 3 Atk. 734.

(m) 1 Wils. 341.

(n) *Carth.* 343.(o) *Willes*, 177.

quality

quality of the expression, but from the rule of law, which favours the vesting of estates, a rule that is only to be resorted to, when no contrary intention is to be collected from the instrument.

1820.

 Marquis
 CHOLMON-
 DELLY
 v.
 Lord
 CLINTON.

The cases where, under a limitation to heirs of a particular description by purchase, a person apparently intended though not exactly answering both parts of the description, has been allowed to take, are instances of a departure from the strict interpretation of the word "heir." *Pybus v. Mitford*. (a) *Brown v. Barkham*. (b) *Burtenshaw v. Weston*. (c) *Wills v. Palmer*. (d) *Baker v. Wall*. (e) It is settled that where a tenant in tail by descent from his mother suffers a recovery, and limits the use to himself and his heirs, the estate continues to be descendible to the heir *ex parte maternâ*, the usual meaning of the word being confined by construction of law, in regard to the nature of the estate. *Roe v. Baldwere*. (f) *Martin v. Strachan*. (g) If in this way the meaning of the word "heirs" may be restrained to a particular class, why may it not, when required by the intention, be held to refer to the heirs at a particular time.

If the intention, as collected from other parts of the instrument, is to be consulted in the interpretation of this limitation, the main question would be decided; and it was chiefly to ascertain whether any rule of law forbade that mode of construction, that the case for the opinion of the Court of King's Bench was sent. The three learned Judges who have certified against the claim of Lord Clinton, begin by stating their opinion, that as the

(a) 1 *Ventr.* 372. 1 *Freem.* 351. 369. 2 *Lev.* 75.

(b) 2 *Vern.* 729.

(c) *Fearne*, App. 570.

(d) 5 *Burr.* 2615.

(e) Cited 1 *Str.* 41.

(f) 5 *T. R.* 104.

(g) *Ib.* n. 1 *Str.* 1179. 1 *Wils.* 66. 4 *Bro. P. C.* 486.

1820.

Marquis
CHOLMON-
DELEY
v.
Lord
CLINTON.

words of the limitation are unambiguous, and denote the settlor himself, Lord *Clinton* took no estate. They then proceed to say, that, supposing the contrary of what is settled in the first part, the person meant to be designated cannot be collected with certainty. The first part excludes intention; in the second, that position is abandoned; and it is, therefore, impossible for the Court, from this certificate, to be informed whether the supposed rule of law does or does not exist. Considering this uncertainty, and the opinion of Mr. Justice *Bayley* on the other side, we submit that the Court will not feel satisfied on this point without taking the opinion of another court of law.

II. The deed of 1794 was a conveyance by a party entitled to an equitable fee-simple, of all his interest, and a conveyance by a party equitably entitled has in this Court the same effect, as if he had been seized of a corresponding legal estate. The introduction of trusts, Lord *Hardwicke* says, "would not have been endured, if courts of equity had not in general allowed these trust estates to have the same consideration in point of policy with legal estates, and given the same power to *cestuisque* trust, with respect to alienations, as if it was an use executed." (a) The conveyance must, therefore, give to Lord *Clinton* the same interest, as if the estates had been legal that is, it must confer on him whatever *Horsoe*; Lord *Orford* was possessed of. The mode in which it has been treated on the other side would have been applicable, if it had been an agreement only, but being a deed, its legal construction and effect must be given to it.

It is argued, that the deed being for a particular purpose, its effect is to be confined to that purpose; but

(a) 1 Atk. 591.

the object is disclosed in the recitals; *Horace Lord Orford* executed it, because he was, as he says, satisfied of the intention of the late Earl. The deposition of *Lucas (a)* proves, that he knew what that intention was,

1820.
Marquis
CHOLMON-
DELEY
v.
Lord
CLINTON.

(a) 2 Mer. 259. The substance of this deposition was as follows: — That the deponent was solicitor to *George Lord Orford* from 1770 till his death, and was employed in suffering recoveries of his estates in *Devonshire, Dorsetshire, and Cornwall*; he had several conversations with the Earl, who, he remembered, asked him to whom the estates, after suffering the recoveries, would go, if he should die before he had made a will, or some settlement of them; when he informed the Earl that they would go to his heir-at-law; upon which he enquired whether his uncle would be entitled to them (meaning *Sir Edward Walpole*, who was then living); when the deponent answered that he certainly would, as his Lordship would take a new estate by virtue of the recoveries. His Lordship remarked, that he should never forgive himself if he cut off the right heir, and desired to know who was then his heir on his mother's side, saying that he thought it was *Mr. Rolle* (for whom he had a great regard); that deponent said, he had heard that one *Mr. Trefusis*, in *Cornwall*, was his heir, at which his Lordship seemed astonished, and said, he had never heard of any such person, and that he should be very sorry for it, as he thought and wished *Mr. Rolle* to be his heir, and he desired the deponent to enquire about it; the deponent informed his Lordship, that when recoveries were suffered, he could give the estates to *Mr. Rolle*, or any other person he should think fit; but his Lordship said, that would not do, for he could never think of cutting off the right heir; and the deponent thinking it might take some length of time to come at, and make proper pedigrees of the two families, advised his Lordship, if he made his will, or a settlement, before a proper pedigree could be made, to give the ultimate remainder to the right heirs of *Samuel Rolle*; the Earl gave him orders to draw a settlement accordingly, saying, at the same time, that he should be very unhappy, if any accident should happen to him before it was executed, to think he should deprive the
right

1820.

Marquis
CHOLMON-
DELEY
v.
Lord
CLINTON.

was, and to effectuate it, he makes this deed. He knew that a doubt hung over the title, and consented to remove it; how can the Court be satisfied, that, if he had known of another, he would not have removed that also. He knew that he was the heir of his nephew, and that he was conveying away all that he would claim by heirship. If the Plaintiffs desired to be relieved on the ground of mistake, their Bill must have been differently framed; they must have proved the mistake; and it is certain that there was no mistake of fact, for every circumstance is recited in the instrument. A mistake in law is not proved; and if it were, could the party be permitted to say, that in executing this deed, he had intended to reserve to himself the benefit of

right heir of the estate; the deponent drew a settlement of the estates in *Devon* and *Cornwall*, which was executed soon after passing the recoveries; the Earl afterwards gave the deponent instructions to draw another settlement of the *Dorsetshire* estate, different from the other, saying he did not look upon that to be the *Rolle* family estate, and therefore he made a different disposition of it; the deponent prepared this according to a short abstract of the uses made out by him, and approved by the Earl; the ultimate remainder being limited to the right heir of *Samuel Rolle*; it was then executed by the Earl; the deponent afterwards informed his Lordship that he had ascertained that *Mr. Trefusis* was his heir on the mother's side, and shewed him the pedigree by which it appeared; upon which his Lordship said he was very sorry for it; he was in hopes *Mr. Rolle* was his heir, but he could never think of cutting off the right heir, and then desired the deponent, if he was certain that *Mr. Trefusis* was his right heir, to draw a settlement of the other estates upon *Mr. Trefusis* and his family. He afterwards desired the deponent to put in *Mr. Rolle* and his family, in case *Mr. Trefusis* should die without issue; the settlement was prepared according to these instructions, but was never carried into execution, as the deponent believed, from his Lordship being afraid of cutting off the right heir.

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any other objections that might occur. The lapse of time would be an answer to an application for relief on such a conjectural mistake; for even in cases of fraud, which is not alleged here, relief would not be given after so long a period. *Bonney v. Ridgard (a)*, *Andrews v. Wrigley. (b)*

1820.
Marquis
CHOLMON-
DELEY
v.
Lord
CLINTON.

On this point, Sir *William Grant* cited a case of *Farewell v. Coker (c)*, where relief was given against a release, executed with the intention of releasing a portion charged on the estate, but so worded as to pass the estate itself. That case would have applied, if Lord *Orford* had intended to release a part of the estate only; but it is clear that he meant to release the whole. The operation of the deed was to extend to every part of the estate; but they wish to confine it to one part of his title. In *Farewell v. Coker* it does not appear that there was any legal difficulty: the question was, whether the sister was acquainted with the fact of her father having devised to her, not whether she knew the legal effect of his will.

III. The next question is that on the effect of the length of time during which Lord *Clinton* and his father have been in quiet possession of the estates; having lasted for more than twenty years, it would at law be a complete bar to Mrs. *Damer*, the only person having any pretence of title, and who, as a devisee, could not maintain a writ of right: we contend that it is equally a bar in equity, the general rule being that length of time shall have the same effect on equitable as on legal titles. *Bond v. Hopkins (d)*, *Hovenden v. Lord Annesley (e)*, *Smith v. Clay (f)*, *Underwood v. Lord Courtown. (g)*

(a) 1 Cox, 145.

(b) 4 Bro. C. C. 125.

(c) 2 Mer. 533. See App. No. 1.

(d) 1 Sch. & Lef. 428.

(e) 2 Sch. & Lef. 637.

(f) Amb. 645. 3 Bro. C. C. 639. n.

(g) 2 Sch. & Lef. 71.

1890.

Marquis
CHOLMON-
DELEY
v.
Lord
CLINTON.

It is said that this length of possession, clothed with the receipt of the rents and profits, which, as Lord *Hardwicke* says in *Casborne v. Scarfe* (a), is the highest instance of an equitable seizin, is of no avail, because the estate was equitable; and there could, therefore, be no disseizin. One reason assigned by Sir *W. Grant* for the position, that the equitable ownership cannot be the subject of disseizin, is, that "the disseizin must be of the entire estate, and not of a limited and partial interest in it." But surely in the contemplation of a court of equity the trust is the entire estate, and cannot be reasoned on as a partial interest. His Honour then cites from *Hopkins v. Hopkins* a passage which appears to have been erroneously reported, on a material point; Lord *Hardwicke* having said, not "that in a bare trust no estate can be gained by disseizin, abatement, or intrusion, whilst the trust continues," but that no estate can be so acquired, whilst the trustee continues in possession of the land. (b). But it is not very material to this

(a) 1 *Atk.* 606. Vide App. No. 2.

(b) A note of this case was read by Mr. *Pepys* from a MS. in his possession, containing the judgment of Lord *Hardwicke*, in his own hand-writing. Having been favoured by Mr. *Pepys* with the MS., the editors are enabled to insert the following extract; the remaining part does not differ materially from the report in *Atkins*:—

"My second reason was, that to allow of this will not affect or restrain any rightful power of alienation in the cestuique trust, which the law allows to the owner of a legal estate, and consequently will not lead to a perpetuity. If this were otherwise, it would create a very considerable objection indeed.

"Before the statute 27 *H.8.* the judges and sages of the common law gave uses very hard names—'product of fraud,' and 'subversive of the rules of real property.' To remedy these evils, the statute was made to execute and bring the estate to the use; that after the statute the cestuique use might be seized of the estate at law, in like manner,

this case, whether the doctrine of disseizin does or does not apply to equitable interests ; for it is not necessary, as

1820.
Marquis
CHOLMON-
DELEY
v.
Lord
CLINTON.

as before the statute, he was of the use in equity. This the Judges professed to adhere to ; but notwithstanding that, the necessities of mankind, and the reasonable occasions of families to make use of their estates, compelled them, in a little while, to give way to such limitations of uses as could by no means be admitted of a common-law fee. Future contingent uses, springing uses, executory devises, all foreign to the notions of the common law, were now let in by construction of the Judges themselves. But still they adhered to the doctrine that there could be no such thing as an use upon an use ; but wherever the first use was declared to any person, there it was executed, and might vest for that estate. Therefore, if a man limited lands to *A.* and his heirs, to the use of *B.* and his heirs, in trust for and to the use of *C.* and his heirs, the use was executed in *B.* ; *B.* had the estate by the statute, and *C.* could take nothing.

“ Of this construction courts of equity laid hold, and said, however, the *intention* of the party was to be supported ; it was plain, *B.* was designed to take no benefit to himself ; the conscience of *B.* was affected, and it was still a trust in equity to be executed by subpoena. To this the reason of mankind assented, and it has stood ever since. So that a statute thus solemnly and pompously introduced, has, by this strict construction, to avoid an use upon an use, been reduced to have no other effect but to add two or three words at most to a conveyance.

“ ’Tis true this could not have been endured, if courts of equity had not in general allowed these trust estates to have the same consequences in point of property, with legal estates, and given the owner of the trust in equity the like power of alienation over the trust estate that he would have had over the use, if it had been an use executed by the statute. Therefore tenant in tail of a trust may bar the issue by fine. Tenant in tail of a trust, with remainders over, may dock those remainders by common recovery ; nay, some have gone further, and said, by bargain and sale enrolled. All these are common assurances, and rightful modes of conveyancing.

1820.
 Marquis
 CHOLMON-
 DELEY
 v.
 Lord
 CLINTON.

as His Honour appears to have conceived, that, in order to give effect to the statute of limitations, any estate should have been gained. The statute operates upon adverse possession, and it is not necessary to enquire whether the adverse possession commenced with a disseizin. In copyholds there can be no disseizin, but the statute of limitations does not the less apply to them.

But it is said that our possession was not adverse; that the legal estate was in the mortgagee, and the possession of the mortgagor is the possession of the mortgagee. It is true that, as between the mortgagor and mortgagee, the possession cannot be adverse; but it does not follow that a third person can come in and claim the benefit of that principle. If it were so, the same reasoning would apply to the effect of a fine and nonclaim, which depends equally upon adverse possession, and as to which the rule is, that where the equity charges the land only the fine bars; but where it charges the per-

" But it has never yet been allowed that, in a trust estate, the like estate may be gained or transferred by wrong, as might be by the common law of the legal estate. Therefore, upon a trust in equity, no estate can be gained by disseizin, abatement, or intrusion. It is true there may be a disseizin, abatement, or intrusion upon the trustee, but that is as it affects and binds the legal estate; but of the mere trust or equitable interest, there can be no such thing whilst the trustee continues in possession of the land.

" To apply these instances to this case; the destruction of contingent remainders, by the act of the tenant for life, is considered in law the wrong without a remedy; the law-books call it a tortious act. Now if equity has never yet suffered any other of the wrongful acts above-mentioned, or any thing similar to them to gain or transfer an estate, whilst the trustees continued in possession, what reason can be given why this should take place, or why the court should strive to preserve this power to the cestuique trust for life, the execution whereof the law itself calls a wrong?"

son only in respect of the land, the fine does not bar. (a) If a mortgagor in possession, paying interest, levies a fine, it has no operation as against the mortgagee: *Freeman v. Barnes* (b); but against other persons the mortgagor will have the benefit of it. The case of *Penvill v. Luscomb* (c), where the question was, whether there should be a *possessio fratris* of an equity of redemption, bears closely on this point. The mortgagee was in possession, and Sir J. Jekyll held, that the elder brother, the son of the mortgagor, not having received the rents and profits, or filed a bill against the mortgagee, had never obtained that constructive possession of the equity of redemption, which was necessary to entitle the sister to inherit it. He considered the possession adverse to the mortgagor's heir, while he was out of the enjoyment. So in the case put by Lord *Redesdale*, in *Hovenden v. Lord Annesley* (d), of a tenant disavowing his landlord's title and attorning to another; if the landlord, being apprised of it, acquiesces, the possession of his tenant becomes adverse, and the statute of limitations will run against him.

1820.

 Marquis
 CHOLMON-
 DELEY
 v.
 Lord
 CLINTON.

A distinction was taken by Sir *William Grant*, that though an equity may be barred, it cannot be transferred. (e) This we may safely admit: it is sufficient for the defendant, if the Court decides that Mrs. *Damer's* title is extinguished. It is not necessary to decide whether Lord *Clinton* is entitled. He will succeed not by the strength of his own title but by the weakness of the plaintiff's; not because he has been in possession for twenty years, but because during that time she has been out of possession.

(a) See *Miff. Pl.* 305.

(b) 1 *Lev.* 373. 1 *Ventr.* 80.

(c) *Mosely*, 72. 122. See this case stated from the Register's Book, App. No. 3.

(d) 2 *Sch. & Lef.* 624.

(e) 2 *Mer.* 359.

1820.

Marquis
CHOLMON-
DELEY
v.
Lord
CLINTON.

The case of *Harmood v. Oglander* (a), cited in His Honour's judgment, was not decided upon the point alluded to; and it was besides a case of tenants in common, between whom the statute does not apply without an actual ouster. The case of *Lawley v. Lawley* (b) is very imperfectly reported; and it does not appear from what part of the statement His Honour collected, that the bill was filed fourteen years after the death of Lady *Lawley*; but it seems probable that she was considered to have received the rents as the agent of the trustees, and therefore to stand herself in the character of trustee. If that were not the case, the trustees must have been the principal defendants; but it does not appear that they were even parties.

Davie v. Beadsham (d) is a case very similar to the present. A person who had contracted to purchase a copyhold estate devised it; but the devisee not knowing that the estate passed suffered the heir to be admitted, and did not claim till after twenty years; when the Court held that he was barred. The legal estate was there outstanding in the vendor, but it was held, that the owner of the equitable interest was barred by the adverse possession. *Lyford v. Coward* (c), and *Pentrose v. Trelawney* (e); are instances of equitable interference, in favour of titles resting on long possession only.

The consequences of the doctrine, that has been advanced in this case, must not be forgotten. It has till now been the rule to compel a purchaser to take an estate, where a clear title is deduced for sixty years.

(a) 6 *Ves.* 199. 8 *Ves.* 106.(b) 9 *Mod.* 32.(c) 1 *Ch. Ca.* 39.(d) 2 *Ch. Ca.* 150. 1 *Vern.* 194.(e) 1 *Vern.* 195.

1820.

Marquis
CHOLMON-
DELEY

v.
Lord
CLINTON.

That rule must be abandoned; for it may happen that the estate is subject to a subsisting mortgage, made a hundred years ago. A claim may then be made upon a question of title, originating at any time within the century: the claimant will say, you have acknowledged the mortgagee, you are therefore only his tenant at will: he can turn you out of possession: I can then call on him to let me in to redeem, and possess myself of the estate in spite of the statutes of limitations. The same reasoning that applies to 100 years applies equally to 500 or 1000; no length of time will afford security. Nor is it only when there are mortgages that this will be done; the same danger will result from every term. There has been a late decision (a) in favour of presuming surrenders of terms, which, however, is in a train for being reviewed; and it is understood to be the opinion of some of the highest judicial authorities, that it was an inadvertent one. But in general, a term that has been assigned to attend the inheritance is considered as subsisting to all intents and purposes: it must be made use of in ejectment, and the trustee of it is the person who has the legal title to the possession of the estate. Then, who is he trustee for? He holds it to protect the inheritance, and he is therefore trustee for the rightful owner of the inheritance: he must use the term for his benefit; and then the rightful owner, though he may have been barred at law by 100 years' adverse possession, may call upon the trustee for an assignment.

It may, perhaps, be said in answer, that you may obviate the danger by having the term assigned to a trustee for yourself. But this will only render your condition worse. The trustee holds for the rightful owner:

(a) *Doe v. Hilder*, 2 Barn. & Ald. 782.

CASES IN CHANCERY.

1820.

Marquis
CHOLMON-
DELEY
v.
Lord
CLINTON.

he cannot assign to any other; or if he does, it is a breach of trust, of which the assignment carries notice, and the person to whom it is assigned takes it subject to the same trusts that attached on it before. It is equally open to the claim of the rightful owner, and, perhaps, you may then have recourse to the doctrine of presumption. But there you are stopped; for the assignment is an acknowledgment of the subsistence of the term, and prevents the presumption of a surrender. In *Doe v. Scott (a)*, a surrender would have been presumed, but that the term had been lately assigned. A purchaser, whose conveyancer finds that there is an old term outstanding, is advised to have it assigned for the protection of his title. But he finds, when it is done, that instead of affording protection it destroys his security: by the assignment he sets up the term, and enables the rightful owner to make use of it in ejectment against himself. Before the assignment the adverse title may have been barred by time; but the assignment revives it; the claimant is entitled to the benefit of the term; you cannot say that it is surrendered; and your adversary uses as a sword against you, what was intended as a shield for your protection.

Every question, every claim of title from the origin of the term is let in, and facility given for the assertion of it; and hence it will be more dangerous, in proportion as it is more ancient, as it will open the door to a greater number of dormant questions.

Such are the consequences of this doctrine. A purchaser must be informed, that an outstanding term, instead of being a protection, is most dangerous to his title. He will be placed in this dilemma: if he takes it,

(a) 11 East, 478.

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he takes it subject to the former trusts; if he does not, he leaves it for any other claimant of the estate to get possession of. The title to every estate, that is subject to an attendant term, will be put at hazard; and when we consider that the greatest part of the landed property is held in that manner, we cannot be surprised at the general alarm occasioned by this decision.

1820.

 Marquis
 CHOLMON-
 DELEY
 v.
 Lord
 CLINTON.

The deeds of *November*, 1811, afterwards convey the mortgaged premises to Mr. *Drake*, subject to the like equity of redemption that they were then liable to under the deed of 1785. (a) These deeds merely operate as a transfer of a mortgage; the conveyance must, therefore, be made subject to the subsisting equity of redemption, for no prudent mortgagee will assign in any other manner. It is in the form usual in transfers of mortgages, and is not, therefore, an acknowledgment of the adverse title, but a declaration that *Drake* is to hold with the same notice, and subject to the same equities as before. It is also to be remarked, that this is only an assignment of the mortgage; but the equity of redemption and the mortgage are distinct estates; and though there is a connection between them, yet the respective titles may be de-

(a) See 2 *Mer.* 182. The equity of redemption was reserved in the following words:—"Subject, nevertheless, to the same or the like benefit and equity of redemption, on payment of the said principal sum of 20,000*l.*, and the interest henceforth to grow due for the same, as the said manors, &c. are now held by the said *E. H. Ball*, *Thomas Coutts*, *Edmund Antrobus*, and *Coutts Trotter*, or any or either of them, under and by virtue of the said hereinbefore in part recited indentures of lease and release, bearing date respectively on or about the 4th and 6th day of *June*, 1785, except so far as the right to the said sum of 20,000*l.* is altered or varied hereby." His Honour, in the course of the argument, suggested to the counsel the consideration of the form of this clause.

duced

1820.

Marquis
CHOLMON-
DELEY
v.
Lord
CLINTON.

duced in perfectly different ways. The manner in which the mortgagee deals with his estate, cannot, therefore, affect the equity of redemption. It could not affect Lord *Clinton's* title, as it did not deprive his possession of the quality of being adverse to Mrs. *Damer*. Even if it was a recognition of the deed of 1785, it does not follow that it is a recognition of the title of Mrs. *Damer*. Lord *Clinton* always held under what he conceived to be the true construction of that deed. His possession, is, therefore, adverse to Mrs. *Damer*, who claims under an opposite construction; and it is not the less adverse, because he recognizes that deed as the origin of his title.

IV. The bill contains an allegation that the title to the estates in question being doubtful, the plaintiffs have agreed to divide them. This statement admits of two views, either it is, or it is not uncertain which of them is entitled. If the former be the case, we are involved in the additional difficulty of meeting two plaintiffs, claiming in the distinct characters of devisee and heir at law. Their cases are different, and they ought not to have been joined, so as to prevent us from making distinct defences. But the fact is, that there was no such uncertainty, and Lord *Cholmondeley's* only claim springs from that which is stated to be an agreement to sue jointly, on a supposed title to an estate, of which they have both been out of possession for more than twenty years; what agreement there may be as to the costs of the suit is not known to us, but it is clear, that whatever interest Lord *Cholmondeley* has is derived from a purchase, under circumstances laying it open to the objection of champerty.

The earlier law on this subject is to be found in 2 *Inst.* 207; 208. 562., *Vin. Ab. Maintenance*, B. pl. 5., *Blac. Comm.* vol. iv. p. 135., and *Hawk. P. C.* 235.

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The last and principal statute is that of *Henry the Eighth* (a), which, as expounded in *Partridge v. Strange* (b), applies, whenever the person parting with his right has been out of possession for a year, whether his supposed title be good or bad. See also *Slyright v. Page*. (c) The third section particularly notices suits in Chancery, and the doctrine has been adverted to, and fully recognized as applicable to suits in all Courts, in *Wallis v. Duke of Portland* (d), *Powell v. Knowler* (e), *Wood v. Downes* (f), and *Hitchins v. Lander*. (g) It can, therefore, make no difference whether the supposed title, that is made the subject of contract, be legal or equitable. The suit resting on an illegal contract, ought not to be entertained; but at least Lord *Cholmondeley's* name must be struck out of the bill, as having no interest in the subject matter.

1820,

 Marquis
 CHOLMON-
 DELEY
 v.
 Lord
 CLINTON.

V. In addition to these arguments, it was contended on behalf of the representatives of Sir *L. Palk*, that their case stood in a more favourable situation than that of Lord *Clinton*. It is a clear proposition, that one who is instrumental in representing a title to be good, or in doing any act by which another is induced to advance money on an estate, cannot afterwards set up an adverse claim to that estate; the party advancing the money, has an equity against him who makes the representation. The deed of 1794 is said to have been only a partial confirmation; and suppose that to be the case, as far as Lord *Clinton* is concerned, yet the same deed may have a different effect between different parties. It recites that Lord *Clinton* was the heir at law of *Samuel Rolle*, and that "the said manors, &c. did, on the decease of the said *George* late Earl of *Orford*, come to

(a) 32 H. 8. c. 9.

(b) *Plowden*, 88.

(c) 1 *Leon*. 166.

(d) 3 *Ves*. 494

(e) 2 *Atk*. 224.

(f) 18 *Ves*. 120.

(g) *Coop*. 34.

1820.

Marquis
CHOLMON-
DELEY
v.
Lord
CLINTON.

and vest in the said *R. G. W. Lord Clinton*." It mentions, that the preceding settlement, which it confirms, was executed with the view of raising money. It is for the purpose of procuring persons to advance money that it is made; and these persons could only consider it as an abandonment of all claim on the part of Lord *Orford*. It was a solemn recognition of the title of Lord *Clinton*, and was intended to go out to the world, as a declaration that the estate was his. Can Lord *Orford* afterwards assert a title against those who have listened to his representations? If he executed it under a mistake, the Court might allow him, as against Lord *Clinton*, to retrace his steps; but it will say to him, that it cannot correct his mistake against innocent persons, who were deceived by seeing the words "grant, confirm, and release," under his hand and seal.

We, therefore, submit, that the utmost that can be done against the mortgagees, is to prevent either party from setting up the legal estate vested in *Drake*, and then to permit the question, whether the effect of the operative part of the deed of confirmation is absolute or partial only, to be decided at law. This deed conveys the estates to the uses of Lord *Clinton's* settlement, "in the same manner as if the said indentures of the 6th of *June*, 1785, had not been made; and to and for no other use, intent, or purpose whatsoever." It has been argued, that the latter words, "and to and for no other use, &c." qualify the effect of the former; but they are meant to refer to the uses of the settlement: the meaning is to convey to the uses of the settlement, and no other uses, notwithstanding the deed of 1785; and in reading, the Court will place the stops so as to give effect to the meaning. *Doe v. Martin*. (a)

(a) 4 T. R. 65.

1820.

Marquis
CHOLMON-
DELEY
v.
Lord
CLINTON.

Mr. Butler, for the Defendant Lord Clinton.

In considering the first question which has been made in this cause, much must depend on the meaning of the word "heirs:" there are three interpretations which the law puts upon that word. 1. When it is used in a limitation to the heir of a person taking under the same deed a previous estate of freehold, it then enlarges that estate into an estate of inheritance. 2. When the limitation is to the heirs of a deceased person, it then gives either a vested or a contingent remainder, as best suits the intention of the settlor. 3. The only other meaning of the word "heirs," is when it is used in a limitation to the heirs of a person in existence, to whom no estate of freehold is previously given; it then certainly confers a contingent remainder. The present is a case of the second class. On the part of the Plaintiffs it is contended, that the limitation conferred a vested estate on the person who was then the right heir of *Samuel Rolle*, which person was then *George Lord Orford* himself. On the part of the Defendants it is contended, that it gave a contingent interest to the person who, when the united line of the *Rolles* and *Walpoles* should fail, would be the right heir of *Samuel Rolle*.

The first objection to the construction of the plaintiffs is, that it sins against one of the most important and best settled rules of construction, viz. that, in the interpretation of deeds, that construction is to be adopted, which gives effect to every part of the instrument, and that construction rejected, which takes away the effect of any part of it. *Shep. Touch.* 87. 1 *P. Wms.* 457. Their construction makes not only the two limitations

1820.

Marquis
CHOLMON-
DELEY
v.
Lord
CLINTON.

ations to such uses as Lord *Orford* should appoint, and in default of appointment to the right heirs, perfectly useless, but renders the whole deed a nullity. Lord *Orford*, having by the recovery and deed of *June* acquired the fee-simple, might dispose of the estate as he thought proper; and if he did not, it would have descended first to his lineal, and then to his collateral heirs. Then what did the deed of *August* achieve? By the powers of revocation and new appointment, Lord *Orford* might appoint the estate to such persons as he thought proper; and if he made no such appointment, it would descend to his lineal, and then to his collateral heirs. This is neither more nor less than had been done by the deed of the preceding *June*. It is possible that some very nice, refined, and theoretic distinctions might be pointed out, but still what practical, what substantial purpose could be answered by the deed of *August*, that was not already answered by the deed of *June*?

Thus far we get without entering into the minutiae of the deed; but, if we proceed to the particulars, we shall find the argument equally strong. In the description of the parties, Lord *Orford* barely mentions his paternal heirship: he just names his father; but, when he describes his maternal heirship, he ascends to his great-great-grandfather; and it is somewhat remarkable, that he wholly forgets to mention his illustrious grandfather, Sir *Robert Walpole*, at that time a very prominent figure in the mind of every Englishman of birth and fortune, and certainly the most prominent figure in the mind of every member of the *Walpole* family, of which he was the founder. This shews how little he thought of the paternal line. He then recites his object; and one cannot hear, without surprize, that there has been a doubt of the meaning of a recital that is so clear. It mentions that he became tenant in tail of the premises; then re-
cites

cites the indenture of bargain and sale, and the recoveries, and then states his wish, "that the said premises should continue and remain in the family and blood of the said *Samuel Rolle*." No recital could have been framed expressing the intention in clearer language than is done in these few lines.

1820.

 Marquis
 Cholmon-
 deley
 v.
 Lord
 Clinton.

The operative part is introduced by words expressive of the same intention; and it is beyond a doubt, that Lord *Orford* considered, that the persons whom he describes in the limitation as the right heirs of *Samuel Rolle*, were the same persons as those whom he had mentioned in the recital, and in the commencement of the operative part.

In *Parkhurst v. Smith* (a), Lord C. J. *Willes* lays down the following rules of construction:— "It is said in our books, that the construction of deeds ought to be favourable, and as near to the apparent intent of the parties as possibly may be, and as the law will permit. That too much regard is not to be paid to the natural and proper significations of words and sentences, to prevent the simple intention of the parties from taking effect; for that the law is not nice in grants, and therefore it doth often *transpose* words" (this expression is deserving of particular attention) "contrary to their order, to bring them to the intent of the parties. On the foundation of these rules," he adds, "whenever it is necessary to give an opinion upon the doubtful words of a deed, the first thing we ought to enquire into, is, what was the intention of the parties. If the intent be as doubtful as the words, it will be of no assistance at all; but if the intent of the parties is plain and clear, we ought, if possible, to put such a construction on the

(a) *Willes*, 352.

doubtful

1820.

Marquis
CHOLMON-
DELEY

v.
Lord
CLINTON.

doubtful words of a deed as will best answer the intention of the parties, and reject that construction which will manifestly tend to overturn and destroy it."

Arguing from these rules, let us suppose that, after the limitation in question, these words had been subjoined, "Thereby meaning and intending the then right heirs of the said *Samuel Rolle*:" the superadded words must then have governed the construction. But this certainly is not the present case. Then let us suppose, that in the recital, after expressing His Lordship's wish to settle the estate upon the person who, at the time of the expiration of the previous uses, should be the heir of *Samuel Rolle*, a clause had been added, declaring "that the words in the last limitation should be construed accordingly." Would not the words in this clause have applied so directly to those used in the ultimate limitation, as to have obliged the Court to consider them as incorporated into that limitation? Still, however, these words are not actually used. Then let us make a nearer approach to them, and suppose that the words of the recital, and the words introducing the operative part, and describing the consideration, inducement, and object of it, had been added to the ultimate limitation, would they not have controuled the words of the limitation, and have caused it to be construed accordingly? Here we nearly reach the present case; for supposing the words to be left in the place where they now stand, and the deed to contain a plain and express clause, signifying it to be the intention of Lord *Orford*, that the words in the limitation should be construed in such a manner as would give effect to the avowed object of His Lordship, appearing by the recital, and the words at the commencement of the operative part of the deed, would not such a clause have given to the ultimate limitation the construction contended for by the Defendants?

Then

Then is not such a clause implied? Whenever a testator or settlor declares an intention that his estate shall go in a particular manner, must he not always be understood to declare an intention, that his words shall be construed in the manner which will give that intention effect.

1820.
 Marquis
 CHOLMON-
 DELEY
 v.
 Lord
 CLINTON

In *Brown v. Barkham* (a), Lord Chancellor Cowper puts the case of a man, who has lands at common law and in Borough-English or Gavelkind, devising the former to his heirs in Gavelkind or Borough-English, the latter words will controul the word heirs; and he says, "It is most certainly a good devise to the youngest son in the one case, or to all the sons in the other." Now if, in either of the cases propounded by Lord Cowper, the framer of the deed had expressed an intention, that the estate should go to the heirs in Gavelkind or Borough-English, and that the word "heirs" in the limitation should be construed accordingly, such a plain declaration must have given to the word the intended construction. In the present case, if any one of the expressions alluded to, either in the recital or in the introduction to the operative part, had been superadded to the words "right heirs of *Samuel Rolle*" in the last limitation, the construction must have been that contended for by Lord Clinton; as it is, those expressions must be considered as if they were brought down to the limitation, and the limitation must be construed as if those words formed a part of it.

The argument is fortified by considering the expressions which introduce the different limitations. After the first limitation to *George Earl of Orford* for life follow the words, "and after his decease." Hence,

(a) *Prec. Ch.* 461—464.

1820,
 Marquis
 CROLMON-
 DELEY
 v.
 Lord
 CLINTON,

if it be contended that His Lordship, in speaking of the right heirs of *Samuel Rolle*, intended to designate the person who at that time answered that description, he being himself that person, this preposterous consequence will follow, that the deed must be read as if the estate had been limited "to the use of *George Earl of Orford* for life, and after his decease to the use of *George Earl of Orford*." The very circumstance of his having taken a previous life-estate excludes the supposition of his having been intended to take under the subsequent limitation.

On this part of the subject, two cases particularly, which have been already cited (a), are worthy of remark. They are *Spark v. Spark* (b), and *Archbishop Cranmer's case*. (c) The same Judge decided both cases, and of course was anxious that it should be known why the decisions were different: he therefore gives his reasons; the first is, that in *Cranmer's case* the limitations were by way of use; the second, that the land was limited by the party himself, "so he shows his intent, that it should not vest in himself, but in his executors." But in *Spark v. Spark* the limitation is by a stranger, "wherein there is not any intention appears but that it should vest in the lessee himself." We have in this deed, as in *Cranmer's case*, a limitation by way of use, and limitations made by the party himself. *Cranmer's case*, therefore, applies directly to the present.

There are two other cases bearing upon this point. The first is *Pyot v. Pyot* (d), in which, after a devise in trust for the testatrix's daughter, there was a gift

(a) 2 Mer. 293.

(b) Cro. Eliz. 666.

(c) Dy. 309. a.

(d) 1 Ves. sen. 335. See also 15 Ves. 99, 111.

over (in the event of her death before twenty-one of marriage) to the testatrix's nearest relation of the name of *Pyot*. The daughter was the only next of kin of the testatrix, and Lord *Hardwicke* held, that the description in the ultimate gift must refer to the time of the contingency happening. In general the word "relations" signifies that description of persons who would be entitled to the testator's personalty at the time of his death; but in this case, from the circumstance that the daughter, who was then the sole next of kin, was the first devisee, it was inferred that she was intended to be excluded, and the next of kin at the time of the contingency happening were held entitled.

1829.
Marquis
Chalmers
v.
Lord
Clinton.

The other case is *Marsh v. Marsh* (a), in which the word "relations" in an ultimate bequest of personalty upon a contingency was held to refer to that period, and not to the person answering the description at the death of the testator. The ambiguity in the words used by Lord *Loughborough*, as reported in *Brown*, is removed by a note of Sir *Samuel Romilly*, inserted in the edition of Mr. *Bell*, "The testator," says His Lordship, "certainly meant that the nearest relation at the time of the decease of the son should take the property, and not the nearest at his own decease. To suppose he meant a reversion to his son is impossible, and his wife clearly has no title: the surviving sister is alone entitled."

It has been urged as an objection to the construction contended for by Lord *Clinton*, that supposing the limitation in question did not point to the person who, at the execution of the deed, was the right heir of *Samuel Rolle*, it is not clear to what period of time it is to be referred, whether to the death of Lord *Orford*, or to his

(a) 1 Bro. C. C. 295., *Bell's* edition.

1820.

Marquis
CHOLMON-
DELEY
v.
Lord
CLINTON.

death without issue. The first answer is, that the description clearly referred to his death without issue, as till that event his heirs would be the heirs of *Samuel Rolle*. But there is a better answer to be given to this objection. Where there are two constructions, and the same person is entitled under each, the Court will not consider, because it is uncertain which of the two is the most probable, that the one neutralizes the other; but will give it to the party who has an equal claim under either. Thus in *Jones v. Morgan (a)*, where the devise was contended to be good in either of two different modes of construction, the Judges, as appears by their certificate, thought it no objection to the validity of the devise, that arguments could be adduced in favour of each construction, when in the events that had happened the same party was entitled under both.

It is said that the word "heir" is a technical word, and that technical words must always be used in the meaning technically appropriated to them. But in the law of England there is no technical word, if by that term is to be understood a word of so inflexible and of such a determinate signification, that no implication, no manifestation of intention can alter its supposed technical meaning, except in the single case, where an estate is given to the heirs of a person to whom an estate of freehold has been previously limited; there it enlarges that estate to an estate of inheritance. This is the only instance in which the word "heirs" receives that inflexible construction. It is true that there are certain words necessary to create certain estates and obligations. Thus an estate of inheritance cannot be created without the word "heirs." An exchange at common law cannot be effected without the word "exchange;" nor an

(a) *Fearne, Cont. Rem. App.* 577.

express warranty without the word "warranty." But all these words admit of modification, and, when the intention of the party requires it, will receive a construction different from their strict technical meaning.

1820.
Marquis
CHOLMON-
DELEY
v.
Lord
CLINTON.

Sir *W. Blackstone*, in his argument in *Perrin v. Blake (a)*, states, that all rules of construction are reducible to three classes, which he there particularizes: in the first, which he describes as "the indelible landmarks of property irrevocably established by the well weighed policy of the law," the intention of the party is controuled by the words, and in the two others the words are controuled by the intention; now the present case does not fall within the first class; there is no rule of law which prevents a person from limiting an estate to one, who at a future period shall answer the description of his own heir at law, or the heir at law of another: it falls within the second or third class; that is, within those classes in which the intention controuls the words; and what the intention actually was, we have, in addition to what has been already urged, the authority of the illustrious Judge by whom this cause was first heard. He says, "That Lord *Orford* had the intention which is ascribed to him, there can, I think, be no reasonable doubt."

2. It may be further contended, that the limitations in question are to be considered, not as legal, but as equitable limitations, and that the deed is consequently to be construed with all that benignity, which courts of equity use in the construction of equitable limitations. Although at the time when the deed was executed, the uses were legal, yet when Lord *Orford* afterwards mortgaged the estate in fee, he transferred those legal uses to the equity of redemption, giving them all the in-

(a) *Harg. Law Tracts*, p. 489. *Jur. Ex.* vol. 3, p. 581.

1820:
 Marquis
 Gholmon-
 delly
 v.
 Lord
 Clinton;

cidents of equitable limitations, and amongst these, that of receiving an equitable construction. If a testator, having devised an estate to one for life, with a remainder to the right heirs of *J. S.*, or otherwise in contingency, were afterwards to mortgage it in fee, and on his death the devisee for life were to file a bill to redeem, would not the Court, in directing a conveyance to him, insist upon the insertion of a limitation to trustees to preserve the contingent remainders?

But we are not driven to this argument; for at the time of the execution of the deed of 1784, the equitable estate in fee-simple was either in *Robert Lord Clinton*, or *Horace Lord Orford*. If it was in *Lord Clinton*, the title of the defendant is complete; then supposing it to have been in *Lord Orford*, that deed could only operate as a conveyance of the equity of redemption. These limitations, as they now come before the Court, are therefore to be considered as originating from the supposed equitable seizin of *Lord Orford*, and consequently as originally trusts. It follows that the limitation to the right heirs of *Samuel Rolle*, on which the question arises, is to be construed with all that amplitude of equitable benignity, which courts of equity apply to the construction of instruments whose effect is merely equitable.

Deeds operating on equitable estates are not properly to be called conveyances, but are mere declarations of the trusts. It is immaterial in what part of such a deed the trust is to be found, whether in the recitals, the operative part, or the exposition of its fiduciary purposes. Wherever it appears, wherever it is most clearly and unequivocally expressed, that part denotes the purpose of the instrument, and virtually becomes the operative part.

In

In this deed we have a recital, and it is to be observed, that a recital even at law is an agreement; *Severn v. Clarke* (a), *Graves v. White* (b), and see the cases cited in *Powell on Contracts*, in which an exception, although void at law, is considered as an agreement in equity. To apply the doctrine in these cases to the present, we have a recital, we therefore have an agreement. It follows that the operative part of the deed will, if it admits of such a construction, be construed in conformity to it; if it do not, the Court will ascertain which of the two agreements, that in the recital, or that in the operative part, most probably expresses the intention of the settlor, and that agreement, whichever it may be, must prevail.

1826.
Marquis
CHOLMON-
DELEY
v.
Lord
CLINTON.

The distinction between the cases in which a court of equity will construe or rectify a settlement executed before marriage, according to articles, if they are alluded to in the recitals, and those in which, if they are not referred to, the Court will presume that the parties have come to a new agreement, may also be cited in support of this argument. *Vide Honor v. Honor* (c), *West v. Erissey* (d), *Legg v. Goldwire*. (e) Here, though there are not articles, there is a recital equivalent to an agreement, and can it be decided that where the agreement appears in a different instrument, it shall prevail, but not where it is inserted in the very deed by which the settlement is made?

3. We now venture to take a higher ground, and to contend, that setting aside every argument from intention and equitable consideration, and construing the words in the strictest manner according to their legal

(a) 1 Leon. 120.

(b) 2 Freem. 57. 2 Eq. Ca. Abr. 652.

(c) 1 P. W. 123. 2 Vern. 658.

(d) 2 P. W. 349.

(e) Cas. temp. Talb. 20.

1820.
 Marquis
 CHOLMON-
 DELRY
 v.
 Lord
 CLINTON.

meaning, they must still have the operation which supports the title of Lord *Clinton*. For this purpose we submit the five following propositions:—

First.—When one or more estate or estates of freehold are previously limited, and are followed by a limitation to such uses generally as the party shall appoint, and in default of appointment to a person or persons specified, the devise over confers a contingent remainder. ,

We beg leave to observe that the proposition consists of two terms; first, that one or more estate or estates of freehold are limited in the first instance, consequently it does not apply to cases where the power of appointment stands first, as where there is a limitation to such cases as a party shall appoint, and in default of appointment, to other uses; secondly, the power must be general; that is, it must be absolute and unqualified, both as to the persons who are to be the objects, and the estates that are to be limited.

Second.—When one or more estate or estates of freehold are previously limited, and are followed by a limitation to such one or more exclusively, of the other or others, of certain specified objects as the party shall appoint, and in default of appointment to the specified objects themselves, the devise over confers a contingent remainder. ,

Third.—When one or more estate or estates of freehold are previously limited, and are followed by a limitation to certain specified objects in such shares, and for such estates as the party shall appoint, and in default of appointment to the objects themselves, the specified objects take vested remainders.

Fourth.

Fourth.— When one or more estate or estates of freehold are previously limited, and are followed by a limitation to certain specified objects, or to such one or more of them as the party shall appoint, and in default of appointment to the objects themselves, there also they take vested remainders.

1820.
Marquis
CHOLMON-
DELEY
s.
Lord
CLINTON.

Fifth.— This position, which is to be particularly remarked, as it does not seem always to have been sufficiently attended to, is, that in the two last cases, the remainders over are vested in the specified objects, not in consequence of the limitations over, but in consequence of the very limitations which contain the power.

The first of these rules is established beyond controversy, by *Leonard Lovie's* case (a); the second, by the case of *Walpole v. Lord Conway* (b); the third by that of *Cunningham v. Moody* (c); the fourth by that of *Doe v. Martin* (d); and the last proposition is illustrated by the cases of *Mader v. Jackson* (e), *Davy v. Hooper* (f), and *Hockley v. Mawbey* (g); in all of which the issue were held entitled under a limitation to them as the parents or parent should appoint, although there was no gift over in their favour in default of appointment. These cases prove, that in *Cunningham v. Moody*, and *Doe v. Martin*, the devisees over took vested remainders, not because the estate was limited to them in default of appointment, but because they were the objects specified in the limitation containing the power of appointment.

The three last propositions, and the cases cited in support of them, do not apply to the present case, but

- (a) 10 Rep. 78. (b) *Barnard*. 153. (c) 1 Ves. sen. 174.
(d) 4 T. R. 39. — (e) 2 Bro. C. C. 588.
(f) 2 Vern. 665 1 Bro. P. C. 351.
(g) 3 Bro. C. C. 82. 1 Ves. jun. 143.

Walpole

1820.

Marquis
CRAWFORD
v.
Lord
CLINTON.

Walpole v. Conway does apply to, and is even stronger than the present; and the first case, that of *Leonard Lovie*, is so exactly in point, that there is not any one circumstance in it which is not in the present; and upon the authority of that case, we trust the Court will be of opinion, that the limitation over to the right heirs of *Samuel Rolle* is contingent.

II. The next point is the effect of the deed of *April, 1794*, which has been called the deed of confirmation. It is clear, however, that it could not operate as a confirmation. An estate to be capable of confirmation must be voidable, defeasible, or defective in some respect; but at the time of the execution of this deed a perfect indefeasible estate in fee was absolutely vested either in *Hbrace Lord Orford*, or in *Robert Lord Clinton*. If it were vested in Lord Clinton, the title of the defendant is complete; if, on the contrary, it was vested in Lord Orford, there was no estate or interest whatever in Lord Clinton, and therefore nothing on which a confirmation could operate.

This deed, which has all the language of a conveyance, was to operate to the uses of the settlement of 1792: these words are then added: "in the same manner as if the said indenture of the 1st June, 1785, had not been made." To examine the effect of these qualifying words, it is first to be observed, that it appears from this deed that there was a general and particular intention. The general intention was to confirm the settlements of 1781 and 1792; the particular intention was to confirm them, as if the deed of 1785 had not been executed. Many judges, but none so much as Lord Kenyon, have insisted on the necessity of sacrificing the particular to the general intention; but no instance has occurred or can be imagined, in which the

the general intention has been or might be sacrificed to the particular intention. The deed of 1794 must therefore be considered as having been intended to confirm and establish the deeds of 1781 and 1792, and *that*, in the same manner as if the deed of 1785 had not been made; i. e. to confirm them generally, and to confirm them particularly, with reference to the objection supposed to arise from that deed.

1690.
Marquis
CHOLMON-
DELEY
v.
Lord
CLINTON.

But it is said that there was a mistake in this deed, and that the mistake appears by the recital. In saying this, they admit all that has been urged on our side respecting the effect of the recital in the deed of 1781. It is argued, that from the mention of the doubts respecting the deed of 1785, it appears that this deed produced the deed of 1794. True, it produced that deed; it was the occasion, but it was not the sole occasion of it; it was one reason, but not the only reason. Here, then, is one circumstance to be particularly noticed: the whole state of the title, and all the deeds respecting it, having been recited, and the agreement to obviate the doubt having been also fully recited, the recital proceeds thus: "In pursuance of the said agreement, and being desirous to confirm the settlement of 1781 and 1792." His Lordship had therefore two objects in view, one to pursue the agreement, the other to confirm those settlements: there is no limitation in this expression, nothing to qualify it; the design was to confirm the estates absolutely.

When Lord *Orford* executed this deed, he knew that it was in the contemplation of Lord *Clinton* to borrow money immediately; he knew that on the faith of the deed which he was about to execute, money would be advanced, jointures charged, portions provided, sales made, and, in short, that the estate would become the subject

1822.

Marquis
CHOLMON-
DELEY
v.
Lord
CLINTON.

subject of every kind of dealing of which real property is susceptible. "*Beneficio adjuvari non decipi oportet,*" says *Paulus* in the *Digest*, and morality and good sense, and that which comprizes both, the law and practice of this Court, will say the same. But would not a deceit be put upon the world if Lord *Orford*, were he now alive, could be permitted to come to this Court, to set aside all the contracts, all the loans, all the jointures, all the portions, all the charges and mortgages, and all the sales, original and derivative, that have been made in consequence of that deed, upon the ground of his having been mistaken. If there has been a mistake, should there not be some proof of it? Parties are always supposed to understand the legal consequences of their own acts, and in this case the deed had been deliberately considered by the legal advisers of Lord *Orford*, and he executed it under their advice.

Admitting, for the sake of argument, that so long as the matter lay between Lord *Orford* and Lord *Clinton* alone, it was a voluntary deed, and that during all this time Lord *Orford* had a right to have it construed liberally with respect to himself; yet it ceased to be a voluntary deed, the moment it was dealt with for valuable consideration. It is most clear, that when a person, holding under a voluntary deed, deals upon it with a stranger, he affixes to it all the validity which is attached to the deed, which he executes to the stranger. A purchaser for valuable consideration from a voluntary grantor has a good title against all subsequent purchasers from the original grantor. This is established by *Andrew Newport's* case (a), *Wilson v. Wormal* (b), *Dame Burg's* case (c), *Prodgers v. Langham* (d), *Kirk v. Clark* (e), *East India Company v. Clavell*. (f)

(a) *Skin.* 423.(b) *Godb.* 161.(c) *Moore*, 602.(d) 1 *Sid.* 133.(e) *Proc. Ch.* 375.(f) *Ib.* 577.

On this head it is also to be observed, that when a trust is executed, or a power is exercised, it is the same, as if the executory trust had been omitted in the deed, and the trust executed had been inserted in its place, or as if the power had been omitted, and the use or trust created by the exercise of it had been inserted in its place. Consequently, all the trusts in the deed of 1792, which have been executed, and all the powers which have been exercised, must be considered by relation, to have been inserted in the deed of 1792. Supposing that by the deed of 1792 the mortgage had been made to Sir *L. Palk*, and the equity of redemption had been limited to the uses of the deed of 1794, would the Court have endured for a moment any subsequent attempt of Lord *Orford* to invalidate them? Now where is the difference between the mortgage having been made by the deed of 1792, and its having been made by a subsequent deed executed on the faith of the deed of 1794?

1820.

 Marquis
 CHOLMON-
 DELEY
 v.
 Lord
 CLINTON.

III. The third point, and that which has always been considered as the most important in this great cause, is the question on the effect of the length of time, during which Lord *Clinton* and those under whom he claims have held possession of the estate.

In the case of *Burgess v. Wheate* (a), Lord *Mansfield* has stated at length the history of trusts, and how they were ultimately placed on their present footing. He says, that in courts of equity the trust is considered as the land; and then lays down this rule, that what-ever would be the rule of law, if it was a legal estate, is applied in equity to a trust estate. In the next page, His Lordship repeats the maxim,

(a) 1 *Blackst.* 123, 155. 1 *Eden*, 177., vide p. 218.

that

1820.

Marquis
CHOLMON-
DELLEY
v.
Lord
CLINTON.

that equity follows the law; and this, he says, "is as safe as well as a fixed rule; for it makes the substantial rules of property certain and uniform, be the mode of following it what it will."

From the general rule that equity follows the law, courts of equity act in analogy to the statute of limitations with respect to equitable titles; the analogy to the law applies as well to titles affected by time, as in other cases. *Smith v. Clay* (a), *Bond v. Hopkins*. (b) In the general expressions used by Lord Camden and Lord Redesdale, which are to be found in these two cases, there is no exception of equities of redemption. Perhaps no questions, in which the statute of limitations, and the analogies to it are to be considered, come so frequently before courts of equity as those arising between mortgagor and mortgagee; and it is impossible that a judge of the experience of Lord Redesdale should not have had those cases in his mind, when he used the general language to be found in the last case. This doctrine is still more strongly laid down by His Lordship in *Hovenden v. Lord Annesley* (c); he there says, "*I think the statute must be taken virtually to include courts of equity.*" The language of Lord Manners is equally decisive, in *Meddicott v. O'Donnell*. (d)

The above authorities shew how far the doctrine of barring titles by time has been established by Courts of Equity. The cases on the subject may, it is apprehended, be reduced to the following six classes: —

1. Where a fine, levied by a person who has a tortious enjoyment of a real estate vested in trustees,

(a) Amb. 647. 3 Bro. C. C. 639. n.

(b) 1 Sch. & Lef. 427.

(c) 2 Sch. & Lef. 632.

(d) 1 Ball & Beatty, 165.

has been admitted to bar the person rightfully entitled, after a non-claim of five years. The cases on this are *Clifford v. Ashley* (a), *Salisbury v. Bagot* (b), *Giffard's case* (c), and *Basket v. Pierce* (d)

1690.
Marquis
Cholmon-
deley
2.
Lord
Clinton,

2. Where a person seized of the equitable fee of a copyhold estate devises it, and upon his death the customary heir enters, and keeps possession of it during twenty years, the trustees still holding the legal fee, and the devisee then files his bill to recover the estate: equity will give no relief after the heir's adverse possession for twenty years, *Davie v. Beadsham*. (e)

3. Where it is desired to supply the want of a surrender of a copyhold estate, after twenty years' adverse possession; then equity will not relieve, *Cook v. Arnham*. (f)

4. The fourth class of cases contains those, in which this doctrine most frequently comes before the Court; these are where a redemption of a mortgage is prayed for, after a possession for 20 years by the mortgagee, without recognition of the title of the mortgagor; equity will not then permit him to redeem, such cases are very numerous: *Saunders v. Horde* (g), a case of great

(u) 1 Ch. Ca. 268.

(b) *Ib.* 278. This case is questioned by Lord Redcliffe, in *Kennedy v. Daly*, 1 Sch. & Lef. 378. The order, dismissing the bill without costs, is entered in the Register Book, B. 1676. fo. 690., where it is mentioned that the cause was argued for three days before the Lord Chancellor, Lord Nottingham.

(c) 1 Freem. 311.

(d) 1 Vern. 226.

(e) 1 Ch. Ca. 39. *Nelson's Ch. Rep.* 76. sub. nom. *Daire v. Beadsham*. This case, and that of *Clifford v. Ashley*, sup. have been searched for in the Register's Book without success.

(f) 3 P. W. 293. *Cas. temp. Talb.* 55.

(g) 1 Ch. Rep. 184.

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1820.

Marquis
CHOLMON-
DELEY
v.
Lord
CLINTON.

importance, and not frequently cited, is one of them: the Court there considered, as Lord *Redesdale* did in a subsequent case, that the plaintiff was barred in equity, not by analogy to the statute, but by the statute itself.

5. The fifth class of cases contains those which have determined that a bill of review shall not be brought after a possession of twenty years. Such are *Smith v. Clay*, *cit. sup.* and *Lytton v. Lytton*. (a)

6. The last class consists of those cases where a tortious possession has originated in fraud, and the Court has considered the rightful owner to be barred, after a possession of 20 years by the fraudulent usurper. The principal of these are, *Winchcombe v. Hall* (b), *Bonny v. Ridgard*. (c)

Many objections have been urged, to prevent the application of the rules laid down in the foregoing authorities to the present case. The first is, that the present is the case of an equity of redemption, and that the analogy to the statute of limitations does not hold in the case of a mortgage: and it is certain that it does not hold between a mortgagor and mortgagee, each recognizing the title of the other; no question upon the statute can arise between them. But no imaginable reason can be assigned, why the same analogy to the statute of limitations, that is allowed to prevail with respect to other trusts, should not be equally allowed with respect to trusts subsisting in equities of redemption. The mortgagee holds the estate as a security for his principal and interest, but beyond that he is to all

(a) 4 Bro. C. C. 441.

(b) 1 Ch. Rep. 40.

(c) 4 Bro. C. C. 130. 1 Cox, 145.

intents and purposes a trustee for the mortgagor. If an estate be vested in a trustee, in trust to pay an annual sum to a particular person, and subject to that trust, in trust for others, it is clear that the first trust engrafted on the legal estate of the trustee would not make him less a trustee for the other claimants. Why, then, should a person's holding the estate as a security, in the first instance, for his own debt, make him less a trustee for the persons interested in the equity of redemption, than his holding it in trust in the first instance for a specific annuitant? The estate of the mortgagee, it must be remembered, is, in some instances, as in presenting to advowsons, and voting at elections, as much recognized at law as if he were the legal owner.

1820.
Marquis
CHOLMON-
DELEY
v.
Lord
GLENFON.

Another objection has been raised, by asserting that the acknowledgment of the estate of the mortgagee is an acknowledgment of the trust charged upon it. Now, in all the cases cited above, the person acquiring the benefit of the trust acknowledged the legal estate which existed in the trustee. But still that recognition, it was held, did not prevent the application of the general rule.

It has been urged that a mortgagor is only tenant at will to the mortgagee; and most assuredly this is the case in law, but most assuredly it is not so in a court of equity: there he is considered as the beneficial owner of the fee, subject to the mortgage, which in this case is considered only as a charge. To use the words of Lord Mansfield, he has the land. The observations on this subject by Lord Hardwicke, in *Casborne v. Scarfe* (a), are decisive.

(a) 1 Atk. 605.

1820.
 Marquis
 Cholmon-
 DELLY
 v.
 Lord
 CLINTON.

It has been said that a tortious act cannot be the foundation of an equitable estate. But it is to be observed, that in five of the six classes of cases enumerated above, the possession was originally acquired by a tortious act: yet in all these cases the Court held, that there was a period of time after which the occupation, though originally tortious, became so far rightful, that the Court would not permit it to be disturbed. The stability of the possession of the wrong doer does not arise from his tortious act having vested a title in him, but from the rightful owner having neglected to assert the rightful title in due time,

One of the cases cited in support of the plaintiff's case, was *Lawley v. Lawley*. (a) That, however, was not a case like the present, of a party seeking to recover an estate by bill in this Court: it was a matter of account; and the proceeding was instituted by one tenant in common against another, so that the statute of limitations, and all analogy to it, were altogether out of the question. Every tenant in common having a right to perform acts of ownership over the entirety of the estate, that which would constitute an adverse possession in a stranger, would not constitute such a possession in one tenant in common against the other.

The case of *Lord Grenville v. Blyth* (b), which cannot be said to have been ultimately decided, as the decree would have been appealed from if the objection to the title had not been afterwards removed, has been considered to make more against Lord Clinton than any other, but will be found to have no application whatever. It did not turn upon the statute of limitations: the question was, whether, under the particular circumstances, there

(a) 9 Mod. 52.

(b) 16 Vet. 224.

had been that dispossession, which, by analogy to the legal principles of disseizins, had vested an equitable seizin, or at least an actual seizin, in Lord *Camelford*. Thus it has nothing in common with the present case, which, as to the point now under consideration, turns entirely on the statute of limitations, and the equitable analogies to it.

1820.

 Marquis
 CHOLMON-
 DELEY
 v.
 Lord
 CLINTON.

This leads us to another objection, namely, that a trustee necessarily holds for the rightful owner. This position we entirely admit, and contending, as we do, that Lord *Clinton* is the rightful owner, we contend that the present trustee is trustee for him. When a trust is created, the trustee holds in the first instance, for the person for whose benefit the trust was originally declared; but when, in consequence of descent, or of alienation, either voluntary or *in invitum*, or by act of law, (and assuredly the operation of the statute of limitations is a very powerful act of law,) the original owner is changed, the trustee ceases to be trustee for him, and becomes trustee for the person on whom the new title devolves.

It has been said, with reference to this point, that there is no such thing as equitable disseizin, abatement, or intrusion, and the judgment of Lord *Hardwicke*, in *Hopkins v. Hopkins* (a), has been cited in support of the position. This cannot be denied; a disseizin is an act by which a stranger usurps the feudal tenure of the legal tenant, and substitutes himself in his place as tenant to the legal lord: it is impossible that this can take place between trustee and cestuique trust; but surely a person may usurp the situation of cestuique trust, and by obtaining from the trustee the actual payment of the rent, or permission to receive it, may sub-

(a) 1 Atk. 581.

1820.

Marquis
CHOLMON-
DELEY
v.
Lord
CLINTON.

stitute himself in the situation in which the rightful owner originally stood, and ought to stand with respect to the trustee. Let us not quarrel about words, let us fabricate a word if it expresses the idea; let us consider all those acts by which strangers and wrong-doers get possession of the benefit of a trust, and by which they place themselves in situations analogous to those of disseizors, abaters, or intruders, as *quasi* disseizins, *quasi* abatements, and *quasi* intrusions. The analogy which courts of equity have established, between their language and that of courts of law, will admit the expression, at least it will admit the thing which that expression is meant to signify. Even the word estate, if considered in its original meaning, cannot be applied to equitable interests, for it originally signified the legal estate, and it was not till long after the existence of trusts that the word estate was applied to them. But there cannot be an estate without a seizin of it, and there cannot be a seizin of that of which there cannot be a disseizin, and, therefore, for the sake of preserving analogy, where the benefit of the trust is wrongfully acquired by another, the rightful owner of the trust may, without impropriety of language, be said to be disseized of it.

The doctrine respecting the protection afforded to purchasers and incumbrancers by outstanding estates is now firmly established: the case of *Willoughby v. Willoughby* (a), decided by Lord Hardwicke, may, to use the expression applied by Lord Kenyon to *Pells v. Brown* (b) upon executory devises, be called the *Magna Charta* of this branch of the law. It is there laid down that an assignment of a term protects a purchaser "against all estates, charges, and incumbrances, created

(a) 1 T. R. 763.

(b) Cro. Jac. 590.

inter-

intermediate between the raising of the term and the purchase." But if the person in whom the outstanding estate is vested, is trustee for all intermediate incumbrancers, the whole doctrine is subverted, and innumerable titles which rest on it will be destroyed. On this subject there is no stronger case than that of *Stanhope v. Earl Verney* (a); but the principle on which it was decided cannot be maintained, if the doctrine contended for on the other side should prevail.

1820.
Marquis
CHOLMON-
DELEY
v.
Lord
CLINTON.

In *Pennill v. Luscomb* (b), a brother of the half blood was held entitled to the equity of redemption of an estate, of which the mortgagee was in possession, in preference to his sister claiming it as heir to her elder brother, upon whom it had descended, but who had never in any manner asserted his ownership, or right to redeem. That case establishes three propositions; first, that when there is a mortgage, and the mortgagor receives the rents of the estates, he is considered to have an equitable seizin; secondly, that when the mortgagor does not receive the rents, or otherwise assert his title, he is not considered to have an equitable seizin; and, thirdly, this proposition, which is applicable to the present case, that when a person entitled to the benefit of a trust does not assert his right in due time, the trustee ceases to be a trustee for him, and becomes a trustee for the actual possessor. The mortgagee was trustee of the equity of redemption, in the first instance, for the eldest son, but on his death he became trustee, not for the heir of the person who once had the right but neglected to assert it, but for the representative of the person to whom it had last belonged. So in our case, if the construction of the plaintiffs is right, Sir E. Hughes was originally trustee of the equity of redemp-

(a) *Co. Litt.* 290. b. n. 2 *Eden*, 81.

(b) *Mosely*, 72. 122. *Vid. ante*, p. 19.

1820.

Marquis
CHOLMON-
DELEY
v.
Lord
CLINTON.

tion for *Horace Lord Orford*, and he continued so till the effluxion of the twenty years: when that time had elapsed, he ceased to be trustee for *Lord Orford*, and became trustee for him who had been in possession twenty years, instead of being trustee for him by whose laches that long possession had been permitted.

The doctrine of Lord *Hardwicke* in *Willoughby v. Willoughby* is confirmed by the case of *Llewellyn v. Mackworth* (a); in which it is stated, that the rule as to the statute of limitations not applying to trusts, only held between a cestuique trust and his trustee, but did not extend to the case of a stranger. "For a stranger is equally obliged to claim the benefit of a trust within the time appointed by the statute in case of a trust estate as if it was a legal estate."

It has been suggested that, if the length of time would have been a bar to *Mrs. Damer*, the deed of November, 1811, by directing the redemption to be governed by the former deeds, was such a recognition of her title, as to prevent the length of time from operating as a bar. The effect of that deed was only to substitute *Francis Drake*, in the place of *Sir Edward Hughes* as the mortgagee, leaving the title to the equity of redemption as it stood before, excepting that the money was to be paid to *Francis Drake*, instead of being payable to the personal representative of *Sir E. Hughes*. Now at that time the right to the equity of redemption rested on the deed of 1794, by which the estate was conveyed upon the trusts of the deed of 1792, in the same manner as if the deed of 1785 had not existed, expressly excluding the latter deed from operation. But it is only under the deed of 1785 that *Mrs. Damer* can claim the equity of

(a) *Barn*, 445.

redemption; and the effect of that deed being taken away, she is totally excluded.

It is certain that the deed of 1811 left the rights of the parties to the equity of redemption as it found them; the only question, then, is, what were their rights previous to the execution of that deed? We submit that the first right of redemption was in Lord Clinton: he and his father had paid the interest, and had had possession from the time of the death of *George Lord Orford*; he was invested with all the rights incident to an estate in possession, and consequently with the right to have it made perfect and indefeasible by the laches of *Mrs. Damer*, if she did not claim within twenty years from the death of *George Lord Orford*. There was a further right in *Mrs. Damer* to revest the estate in herself, and to call for a redemption at any time before the expiration of those twenty years. Lord Clinton had the actual right, defeasible by *Mrs. Damer*, if she defeated it within that time. She brought no bill, and did no act having a tendency to defeat the estate of Lord Clinton; and, therefore, his estate, which up to that period may be termed a running title, and was capable of being established by him, or of being defeated, became absolute and indefeasible.

IV. The last point to be considered is that of maintenance and champerty, as it respects the claim now made by Lord Cholmondeley and *Mrs. Damer*. In respect to one or other of the plaintiffs, the title of Lord Clinton (he being in possession) is unquestionably good; for a title by possession is always good until a better be shewn. In a writ of right it was thought till lately that the tenant was to support his seizin by the strength of his own title, and not by the weakness of that of his ad-

1820.

Marquis
Cholmondeley
v.
Lord
Clinton.

1820.

Marquis
CHOLMON-
DELEY
v.
Lord
CLINTON.

versary. But in *Sidney v. Perry* (a), Lord Chief Justice *De Grey* was of opinion that possession alone was, even in a writ of right, a good title against one who shewed none. It is impossible to contend, that what constitutes champerty and maintenance in a legal estate, or in legal litigation, does not constitute champerty and maintenance in an equitable estate, or in an equitable litigation, if there be evidence of it. The evidence here is on the face of the bill. The plaintiffs pray that an account may be taken of what is due for principal and interest on the mortgage. Thus, one person who has a title, and another person who has none join in a prayer for an account. They then pray that the defendant, *Francis Drake*, may be decreed, upon payment to him by the plaintiffs of what shall be found due upon taking such account, to convey to the plaintiffs. Thus, one person having a good title in fee, and another having none jointly pray for a conveyance; the one, therefore, maintains the other in that prayer.

In *Kenny v. Browne* (b), Lord Chancellor *Fitzgibbon*, after adverting to the disuse into which, much to the injury of society, as he observes, the statutes of champerty and maintenance had fallen, proceeds thus: "Though the letter has not been executed, the spirit of them has been uniformly enforced by courts of equity; and I do not know a single instance that has occurred in which those statutes have been violated, where a court of equity has refused to interpose, for the relief of the party who has been injured by the breach of those statutes."

The same doctrine is laid down in *Powell v. Knowler* (c), *Wallis v. Duke of Portland* (d), *Stevens v. Bag-*

(a) *Co. Litt.* 239. a. n. 1. 17th ed.(b) 3 *Ridgw. P. C.* 502.(c) 2 *Atk.* 224.(d) 3 *Ves.* 494.

well. (a) In the second of these cases, Lord *Thurlow* went fully into the subject, and treated it as beyond argument, that the law of maintenance and champerty applied to suits and titles in equity. He gives it as his own opinion, and states it to be a fundamental doctrine, that maintenance is not only *malum prohibitum*, but *malum in se*. Can the Court, then, in the face of an agreement, shewing that there has been a vicious dealing with the property, consistently with its established principles, grant relief to parties who found their right on that which Lord *Thurlow* affirms to be both illegal and vicious.

1830.
 Marquis
 CHOLMON-
 DELEY
 v.
 Lord
 CLINTON.

The *Attorney General* in reply — after observing *June 5, 6.* that the case of the Defendants still rested upon much the same reasoning as had been originally adduced in support of it, and that he should consequently be under the necessity of recapitulating, in a great measure, the arguments which had been already urged on behalf of the plaintiffs, proceeded to state, that if the limitation on which the first question arose were considered alone, abstracted from all consideration of the previous part of the deed, no lawyer could entertain the slightest doubt as to its legal effect; it would give a vested estate to the person who, at the time of the execution of the deed, was the right heir of *Samuel Rolle*. It is, however, contended, that on reference to the former parts of the deed, and to the circumstance, that Lord *Orford* was himself the right heir of *Samuel Rolle*, so clear an intention on the part of the grantor is disclosed, that, in construing this limitation, the Court is enabled to depart from that which is admitted to be its natural and legal import,

(a) 15 *Ves.* 156.

and

1820.

Marquis
CHOLMON-
DELEY
v.
Lord
CLINTON.

and is authorised to carry down the recitals to, and incorporate them with, the limitation, and thus to convert the limitation in question, from a vested into a contingent remainder, to take effect on the determination of the prior estates. Now, assuming that conveyances to uses must be construed in the same manner as common-law conveyances; a proposition which seems to be almost admitted, and which may be considered as settled by the cases of *Tapner v. Merlott* (a), *Alpass v. Watkins* (b), and *Doe v. Morgan* (c); the answer to this argument is, that if the limitation is clear and unambiguous, no intention to be collected from other parts of the instrument can enable the Court to put on it a different construction: it must be construed according to its legal effect, although the intention, as disclosed in the recitals, is, in consequence, altogether subverted. To what is said in *Parkhurst v. Smith* we fully subscribe; but to make it apply to the present case, it must first be shewn, that these words are of doubtful import, and require some assistance to explain them. In attempting to do this, the defendants have altogether failed. The law on this subject is clearly laid down by Lord Holt in *Montague v. Bath*. (d) "The reciting part of a deed," he says, "is not at all a necessary one, either in law or equity. It may be made use of to explain a doubt of the intention and meaning of the parties; but it hath no effect or operation. But when it comes to limit the estate, there the deed is to have its effect according to what limitations are therein set forth, and that," alluding to the deed then in question, "is plain and full without any manner of contradiction whatever."

Supposing, for a moment, that the intention could controul the legal effect of this limitation, it is incumbent

(a) *Willes*, 180.

(b) 8 T. R. 519.

(c) 3 T. R. 765.

(d) 3 Ch. Ca. 101.

on the defendants to shew what that intention was ; but whether the limitation was to vest immediately in some other person than Lord *Orford*, or at a future period, is altogether a matter of uncertainty. It is said that the period intended was the determination of the previous estates ; but suppose Lord *Orford* had exercised his power of appointment, what then becomes of that intention ? His wish was to make the estate descendible in the *Rolle* family ; but how that was intended to be accomplished is perfectly vague and uncertain : in the mode proposed it would be almost immediately defeated ; for whoever might answer the description at the future period, it must vest in him or her by purchase, and the estate would then, of course, descend to the heirs *ex parte paternâ*.

1820.

 Marquis
 CHOLMON-
 DELEY
 v.
 Lord
 CLINTON.

The cases in which this Court has corrected words from the recital of a contract have no application ; this was a voluntary settlement. Those on wills are likewise inapplicable. In *Lisle v. Grey (a)*, there were words of reference, and it was necessary to have recourse to the preceding limitations, in order to construe the one in dispute : in this case, the limitation contains no words of reference, and it is entirely free from obscurity.

The construction which is contended for by the Defendants, violates two important rules of law ; 1st, That a remainder shall, if possible, be construed vested rather than contingent ; and, 2dly, that no one can make his own right heir a purchaser. The effect of this limitation, in point of law, was to vest the old reversion in Lord *Orford*. *Vide* the case of the two daughters. (b) In answer to this, it is said that such is not the effect where the grantor is himself the right heir ; and a

(a) 1 Lev. 223. Raym. 378.

(b) Co. Litt. 25. b.

1820.

Marquis
CHOLMON-
DELEY
v.
Lord
CLINTON.

distinction taken by *Walmsley*, in *Spark v. Spark* (a), between that case and *Cranmer's* (b), is much relied on. In the former case, the estates were both chattel interests, but in the latter, one was freehold and the other a chattel. What *Walmsley* said was merely an *obiter dictum*; and in *Cranmer's* case it is stated that there was a difference of opinion among the Judges, and that a writ of error was brought. By one of the notes in the margin of *Dyer*, which are known to have been added by *Treby C. J.*, and, therefore, are entitled to considerable weight, it appears that Serjeant *Bartlet* said, that a contrary decision was made in the 44 *Eliz.*; and Lord *Coke* must have considered the decision either as reversed or over-ruled, or, at least, that there was no ground for the above distinction, as in commenting on the cases he does not allude to it. *Co. Litt.* 545.

One of the counsel for the defendants, feeling the pressure of this part of the case, has resorted to a most extraordinary line of argument, and has contended, that upon the result of the five propositions which he has stated (c), this is a contingent remainder. The three last of those propositions favour the construction of the plaintiffs, and shew that estates limited, in default of appointment, vest subject to be divested by the exercise of the power: the two first rest on *Lovie's* case, and *Walpole v. Conway*, which have been over-ruled, after much argument and discussion, by *Doe v. Martin*, and *Cunningham v. Moody*. These cases have been followed by several others, *Maundrell v. Maundrell* (d), and other cases cited in *Sugden*. (e) The rule is so laid down by Mr. *Fearne* (f), and Mr. *Sugden*. (g) In the edition of Mr. *Fearne's* work, edited by Mr. *Butler*,

(a) *Cro. Eliz.* 666.(b) *Dyer*, 509.(c) *Vide ante*, p. 39.(d) 10 *Ves.* 265.(e) *Tr. on Pow.* 143, 144., 2d ed.(f) *Cont. Rem.* 226.(g) *Tr. on Pow.* 144.

there

there is no note pointing out the existence of any such distinction between a general power of appointment and one confined to particular objects, nor has any case or authority been quoted in which it is to be found. It is said that the law in 1781 was different: it would not be difficult to point out, by reference to the decisions of Lords *Mansfield* and *Kenyon*, alterations more striking than the one in question, but still one rule only can be adopted. The law is permanent, and cannot be altered by one or two decisions. It has been asserted that Sir *William Grant* considered the intention of Lord *Orford* as perfectly clear; that is not the case; all that he said was, that there could be no doubt he intended to keep the estate in the blood of the *Rolle's*, but how that intention was to be carried into effect was altogether matter of doubt and conjecture; the impossibility of deciding was one of his reasons for not adopting the construction insisted on by the defendants; for what other purpose did he cite the cases of *Seymour v. Boreman*, and *Doe v. Pugh*? (a)

1820.
 Marquis
 CHOLMON-
 DELEY
 v.
 Lord
 CLINTON.

II. As to the second question, the effect of the deed of confirmation, we stand upon a principle as firmly settled as any in this Court; that a deed of this description will not be carried beyond the intention of the parties, and that if by mistake or inadvertence it should exceed that intention, it will be restrained and reformed according to it. The cases beginning with *Lansdown v. Lansdown* (b), and ending with *Braybrooke v. Instip* (c), are all uniform on this subject. The intention of Lord *Orford*, as appears from the deed itself, was merely to remove the doubt created by the deed of 1785; and the effect and intention of the deed, so

(a) See 2 *Mer.* 347, 348.

(b) *Mos.* 364. *Vide App. No. 4.*

(c) 8 *Ves.* 417.

1820.

Marquis
CHOLMON-
DELEY
vs
Lord
CLINTON.

far from interfering with the limitation in the deed of 1781, was to strengthen and confirm it. A distinction has been taken, that this is a conveyance of the estate, and not a confirmation; that can make no difference: the intention of the parties alone must govern the construction; and with respect to the argument in favour of persons, who, it is said, have become purchasers under this deed, and have advanced money on the faith of it, that at once falls to the ground, when we consider that they are purchasers with full notice of the deed of 1781, and that they were bound to take notice of the effect of the deed of 1794: because they are purchasers, they cannot carry this deed further, or give it a more extensive operation than Lord Clinton could, and still less can they do so, when it appears by the pleadings and evidence, that when they advanced their money, they had never seen or heard of it.

III. The argument as to length of time proceeds on the notion of a disseisin; but as long as the legal estate remains untouched, there can be no disseizin. *Hopkins v. Hopkins* (a), *Lord Pemfret v. Lord Windsor* (b), *Lord Grenville v. Blyth*. (c) The possession of the cestuique trust is that of the trustee; when the latter is called upon to divest himself of the legal estate, it must be in favour of the party entitled under the original deed; and no time can bar a cestuique trust, while the title of his trustee remains unaffected. The rule must be still stronger between mortgagor and mortgagee. A lease by cestuique trust will bind the trustee in this Court, but a mortgagor has no estate: he has nothing but a right of redemption; and he or any lessee under him are mere tenants at will, and may be ousted by the mortgagee without notice. (d) It is said,

(a) 1 Atk. 591.

(b) 2 Ves. 472.

(c) 16 Ves. 230.

(d) *Vide Burgess v. Wheate, ubi supra.*

that

that this Court, in many cases, acts by analogy to the statute of limitations, as in that of a mortgagee who has been twenty years in possession, and receipt of the rents, without any admission that he holds as mortgagee; but this is an adverse possession of a trustee against the cestuique trust, of a person denying the existence of any right of redemption; he claims as absolute owner; but if he admits that he holds as mortgagee, whatever time may have elapsed, and whether he has suffered *A. B.* or *C. D.* to receive the rents, the equity of redemption exists, and the question who is entitled to it must remain open: the mortgagee must refer his title to the deed by which the mortgage was created; and in no sense, therefore, can it be adverse to that of the mortgagor.

1880.
 Marquis
 CHOLMON-
 DELEY
 v.
 Lord
 CLINTON.

Supposing, for the sake of argument, that there could be an equitable disseizin, when did it take place? If on the death of *George Lord Orford*, he could not devise the estate, and it descended to his heir. The statute of limitations has not run, because, although barred of his ejectment, the heir may bring a real action. If this were a legal disseizin, he might bring his writ of right; and if we argue by analogy to law, the analogy must be pursued. A right of entry is not devisable; and the time fixed by the statute has not expired; for it has never been said, that there is a bar in equity where there would have been none at law. If the estate passed by *Horace Lord Orford's* codicil, and the disseizin did not commence till his death, twenty years have not elapsed, and *Mrs. Damer* would not have been barred of her ejectment. In either way of putting the case, therefore, it is fatal to the argument of the defendants. But if there could be an equitable disseizin, which we do not admit, there has been none in this case. *Lord Grenville v. Blyth* is a distinct authority establishing this pro-

1820.

Marquis
CHOLMON-
DELEY
v.
Lord
CLINTON.

proposition, that the possession of a party improperly in possession, but who is in under the notion that it was according to the original trust, is not adverse to the title of the rightful owner. Now Lord *Clinton*, refers his title to the deed of 1781, he has never pretended to claim adversely to that deed, and he distinctly recognized it in the deed of 1811. The same rule prevails at law, and shews that it is not the mere fact of a man's getting into possession adversely that makes him a disseizor: to create a disseizin, he must enter claiming adversely in title. In *Litt. s. 396. (a)*, it is said, that when a younger son enters on the death of the father, and then dies, the entry of the eldest son is not tolled; for the law intends that he entered claiming as heir to his father, and the eldest son claims by the same title. This exactly applies to the present case: Lord *Clinton* enters by mistake, not by disseizin; not generally, but under the limitation to the right heirs of *Samuel Rolle*; the title, then, was never adverse to us; the possession may have been adverse, but the title never has been.

It would be the same at law, supposing the lands had been in lease, and the lessee had paid the rent, not to the right heir of *Samuel Rolle* under the limitation in question, but to Lord *Clinton*; that is no disseizin of the reversioner, because the possession is referable to the lease: the lessee must admit that he holds under it, and while it exists, his possession is that of the real reversioner. (b) So in the case of a mortgage, while the mortgagee is in possession himself, or by his tenants, the equity of redemption, whoever may receive the rents, can never be affected. But, lastly, if there could

(a) *Vide Co. Litt. 242. a.*

(b) *Vide Doe v. Danvers, 7 East, 299. 2 Sch. & Lef. 633.*

be an equitable disscizin, and supposing that it took place before 1811, we contend that it was put an end to by the deed of transfer executed in that year, because it contains a distinct and complete recognition of the title of the persons, who are really entitled under the deed of 1781.

1820.
 Marquis -
 CHOLMON-
 DELEY
 v.
 Lord
 CLINTON.

On the point of champerty and maintenance it is unnecessary to say any thing, because it does not in the least affect the merits of this case. The agreement between the plaintiffs was not put in issue by the defendants; and the propriety of entering into it, considering the doubts that existed as to which was entitled, cannot be questioned.

The MASTER of the ROLLS. (a)

This case comes before the Court on further directions, upon an order pronounced on the 27th June 1817, by which a question was sent, as one fit for the determination of a court of law, to the Judges of the Courts of King's Bench for their opinion, whether *Robert George William Trefusis*, afterwards *Lord Clinton*, father of the defendant *Lord Clinton*, took any and what estate under the indenture of the 2d August 1781. Upon that question the Judges have returned the certificates of their divided opinions. The Court being in possession of them, has now to consider what further directions ought to be given. That same question must, if there had been no change in the Court, have come under the consideration of the great and learned Judge who made the order;

(a) The editors have been favoured by his Honor the Master of the Rolls, with a note of his judgment, corrected by himself.

1820.

Marquis
CHOLMON-
DELEY
v.
Lord
CLINTON.

and he would now have had to pronounce, for the first time, a decree in the cause, nothing having been hitherto done by the Court, except pronouncing the preceding order, and except delivering a clear and explicit opinion upon all the questions in the cause.

The first question, therefore, now to be considered, seems to be that which separately relates to this question of law. Upon that the only point contended for by the counsel, on the part of the defendants, or which could indeed be contended for by them, after the weight of authorities against their client, is, that before a question of this nature and magnitude is finally decided, another opportunity ought to be afforded for the reconsideration of it in a court of law; a proceeding certainly not without precedent, but not to be directed as a matter of course, nor unless the ends of justice shall appear to demand it.

It is impossible that I should not be impressed with a sense of the heavy responsibility now cast upon me, the great respect and deference due to the opinions of those who have preceded me in judgment in this great cause, and the comparative inferiority that must belong to any opinion of mine. But I cannot feel that I should have properly discharged the duties of my station, or have acted up to the expectation which the parties engaged in this long and important cause have, I think, a right to entertain, if I had forbore to form an opinion of my own on all the subjects brought before me, or if, having formed that opinion, with all the care and industry that my other duties have permitted, I should now omit to state it, and the grounds on which it has been formed.

I have been referred by the counsel for the plaintiffs, both in the opening of these proceedings and in the reply, to the opinion which was delivered by the late
Master

Master of the Rolls, as containing the pith and substance of all that had been or could be urged in support of their case; and I shall therefore follow and refer to that opinion throughout in the views which are therein taken of it, stating, as I go along, the points in which I have the satisfaction to concur, and those in which I have the serious task of differing with so great an authority. In entering upon that examination, it will not, I hope, be deemed an improper momentary digression, if I avail myself of this opportunity of paying a tribute to that most able and deservedly estimated Judge, not by giving vent to my own feelings of personal friendship and respect, which might not be deemed suited to this place, but by the expression of that general feeling of admiration, which I am sure must be common to all, either in or out of the profession, who have heard or read this and the other opinions, which have so eminently characterized the whole of his judicial career: admiration not only of the depth of thought and learning, but likewise of the profundity and strength, the closeness and the accuracy of reasoning, the masterly perspicuity and conciseness, and the peculiar felicity of style by which they are distinguished, which will render them long a standard of judicial eloquence, such as all should imitate, few can equal, and none can excel.

1830.

 MARSHALL
 CHURCHMAN-
 DELBY
 OF
 LORD
 CHURCHMAN.

The substance of the opinion of that learned Judge which is in print, and in the possession of every body, I think may be reduced to three propositions: 1st, That though he thought there was no doubt as to the purpose with which Lord Orford made the settlement, and the description of person to whom he meant to give the estate, in the event of a default of issue of his own body, yet that the words of the limitation could not be so moulded as to carry that intention into execution, that the Court was bound to give them their first and appropriate

1820.

Marquis
CHOLMON-

DELEY

v.

Lord
CLINTON.

appropriate meaning, which he thought did not admit of any other construction than that of giving a vested remainder to the person who was the right heir of *Samuel Rolle* at the time of the execution of the deed. 2dly, That the deed did not furnish any the least evidence of an intention to frame the limitation in the manner contended for by the Defendants, namely, to such persons as should be right heirs of *Samuel Rolle* at the time when the preceding limitation should expire; that we have no ground for supposing that this is what the drawer of the deed supposed himself to have accomplished, when he used the words he has employed; and that it is only because this would have been the most proper limitation to effect the grantor's object, that we are desired to say it is the limitation which he has actually made. 3dly, That as to the actual intent of the framer of the deed, the conjecture which the Master of the Rolls rather seemed inclined to adopt was, that the words "right heirs of *Samuel Rolle*" were used as descriptive of actually existing persons other than Lord *Orford* himself, and that there would be more ground for contending, that this ought to be turned into an immediate limitation to the late Lord *Clinton*, as the person designated, though under an improper description, than into a prospective limitation to the persons, who at a future period should answer that description. This opinion, however, ended in a reference of the question to the opinion of the Judges of a court of law, which they have returned by their certificates.

The certificates are as follows: (His Honor here read them at length.) The reasons for the opinions contained in these certificates, beyond what they import, we are not in possession of; but it is evident, on the face of them, that these high authorities differ in opinion not merely as to the effect of the limitation in question, but likewise upon both the points, on which the

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the construction of it depends. The first, a general question as to the rule, by which the construction of such a limitation is to be governed, whether intention, when sufficiently manifested, can in any case control the legal import. The second, a question applying solely to this particular case, as to the sufficiency of the evidence it affords of the intention of Lord *Orford*. Upon the first point the three learned Judges appear by their certificate to concur with the Master of the Rolls in thinking that the true criterion by which this case is to be governed is not the actual meaning and intent of the framer of the deed, but the legal import and effect of the terms he has made use of. They conceive the rule of construction applying to them to be peremptory and inflexible in favor of the legal import in all cases, and under all circumstances, without regard to a different meaning in the framer of the deed, even though such meaning should be sufficiently manifested by the circumstances of the gift, and the other parts of the deed: that the terms in which the limitation is expressed have annexed to them an unambiguous, settled, well known, and appropriate meaning, which cannot be varied in any case by any circumstances extrinsic to it; according to which the Court is bound to consider them as conferring a vested remainder on the person, who, at the time of the execution of the deed, was the right heir of *Samuel Rolle*: that such meaning must be inviolably and universally adhered to, in preference to, and in exclusion of, any manifestation of a contrary intent, however clearly the same may be established by collateral circumstances, if they could be resorted to, in aid of the construction, or even though such circumstances appear on the face of the deed.

1820.
 Marquis
 CHOLMON-
 DELEY
 v.
 Lord
 CLINTON.

This rule, if it were satisfactorily established to be of this inflexible and universal extent, would supersede

1820.

Marquis
CHOLMON-
DELEY
v.
Lord
CLINTON.

and render unnecessary any enquiry into the facts of the present case, tending to shew the particular meaning and intent which Lord *Orford* had in the use of the words "right heirs in this limitation." But the same authorities have declared under the second head, that if the rule were not of this binding nature, and if the construction were to depend on a manifestation of intent as to the person intended to take when sufficient to overcome the legal import, yet that such manifestation of intent is not sufficiently made out in the present case.

Mr. Justice *Bayley* differs on both these points. As to the general question, he does not deny the existence of a general rule of construction applicable to limitations of this nature, but he denies it to be of that universal and inflexible nature, by which in all cases, and under all circumstances, the construction is to be governed. A limitation, he states, by way of remainder to the heirs or children of a deceased person, is not necessarily confined to such persons as are within that description at the time that limitation was created. Collateral circumstances, apparent on the face of the deed, may, he thinks, and ought to be resorted to, when they exist, in aid of the construction, for the purpose of discovering the real meaning of the settlor as to the person intended to be designated by the terms made use of as his grantee; and that this first meaning, if clearly and sufficiently manifested, may be allowed to get the better of the legal import, and to prevail in favor of the person so proved to have been really intended to be designated. As to the application of this principle of construction to the present case, he thinks, under the second head, that the circumstances attending the present grant, as they appear on the deed, are sufficient to make out such a clear manifestation of Lord *Orford's* intent to designate by the term "right heir," there used, not according to the legal import,

import, the then present right heir of *Samuel Rolle*, but the person who would be the right heir of *Samuel Rolle* at the expiration of the prior estate tail, as ought in this case to prevail in his favor, over the ordinary operation of legal import in favor of the present heir.

1820.
Marquis
Gholmon-
deley
v.
Lord
Clinton.

In this state of conflicting authority, it becomes necessary to consider the subject under both the heads before mentioned, into which the argument seems naturally divided; the first as to the nature and extent of the rule in favor of the legal import applied to a limitation of this nature; the second as to the effect of the proofs afforded in this case of the meaning annexed by Lord *Orford* to the terms made use of by him in this limitation.

The deed, on which the question arises, was a settlement made on the 2d of *August* 1781, of an estate in the counties of *Devon* and *Cornwall*, (called, from the former possessors, the *Rolle* estate,) by *George* Earl of *Orford*, the then absolute owner in fee. The Earl had succeeded on the death of his mother in the *January* preceding, under the will of his grandfather *Samuel Rolle*, to this estate, together with another in the county of *Dorset*, but which latter was not included in this deed, not being considered by him to stand on the same footing; and he repeatedly characterizes it as having been the estate and inheritance of *Samuel Rolle*, probably from its having come by inheritance to *Samuel Rolle*, a circumstance which he appears to have considered as entitled to considerable weight, and which seems to have formed the chief inducement to the making of this deed. It is in the nature of a testamentary deed, without any other parties to it than his own trustee, *Joshua Sharp*, and probably without any other person, except his legal advisers, being privy to its contents; not called for by any particular occasion, nor intended to have any immediate or binding

1820.

Marquis
CHOLMON-
DELEY

v.
Lord
CLINTON.

operation during his life, but to govern the succession to the estate after his death, and particularly in the event, which, being then single and unmarried, and at an advanced period of life, he appears to have anticipated, and which in a few years afterwards actually took effect; viz. his dying without issue. His sole object in making the deed was to provide for that event, by a settlement on his maternal heir, whom he considered entitled, as to this estate, to be preferred to his paternal heir. He addressed himself to the consideration of this subject, (as was observed by the leading counsel for the plaintiffs in the first argument in this Court,) with a moral feeling, not, however, with the moral feeling supposed by that learned counsel to effectuate the will of his grandfather, for in nothing done respecting this estate, since his acquisition of it, had he shewn any such feeling. He had recently, by a recovery, destroyed the estate tail, and the remainders created by that will. In the introductory recital made of the will in this deed, he omits any notice of the remainder over therein given to his cousins *John* and *Samuel Rolle*, and the new estate tail which he gives to himself differs from that given to himself by the will, being an estate in tail general, instead of an estate in tail male. His moral feeling was of another kind: it was as much opposed to any disposition which had been made by his grandfather, as it was to any limitation that he should himself make, by which what he considered to be the right of the heir of the *Rolle* line, to succeed to the estate and inheritance of his ancestors the *Rolle's* might be defeated. His view in making the settlement was not merely to give a general preference to the *Rolle* line, but more particularly that at the appointed time whoever was the right heir, whether one or many, male or female, married or single, young or old, on whom the law would have cast the inheritance by descent, had it been transmitted from

from *Samuel Rolle* to his heirs, without the descent being broken, might thereby be enabled to succeed to the inheritance of his ancestor.

Lord *Orford* foresaw that this object could not be obtained, without a new settlement of the estate on the person who should succeed him as the heir of *Samuel Rolle*, in the event which he contemplated, viz. his death without issue; because in that event the two lines of *Orford* and *Rolle* would no longer be united, and the estate, if he should die seised of the fee recently acquired by the recovery, must descend to his paternal heir of the line of *Orford*, to the exclusion of the line of *Rolle*. To prevent this, and to secure the succession in that event to the succeeding right heir of *Samuel Rolle*, was the sole object of the settlement, and to effectuate which every part of it is directed. The intention is here put out of all doubt, by the solicitude of the settlor to record it himself on the face of the deed, in a recital of unusual detail, in which he expressly states his object, and the reasons for it, not certainly anticipating the doubts that have been thrown on his meaning, for then he would have obviated them by some express word in the operative part, but from a desire probably that the deed should carry on the face of it the reasons for the provisions contained in it. It was natural for Lord *Orford* to wish that his own illustrious family, and particularly his future paternal heir, a near relative with whom he had no difference, should be informed in this mode of the reasons why this part of his property was selected from the rest, to be disposed of by a separate deed, or why in respect to it a preference was given to an unknown and comparatively obscure maternal relation, over his successors in the earldom,

1820.

Marquis
CHOLMON-
DELEY

vs.
Lord
CLINTON.

Lord

1820.

Marquis
CHOLMON-
DELEY
vs.
Lord
CLINTON.

Lord *Orford* begins the recital with the subject which laid the foundation for the deed, and created its necessity, the double line of ancestry, paternal and maternal, of which he was then the representative, the line of *Orford* and the line of *Rolle*: one, the line through which he had received the estate (as he proceeds to shew), the other, that to which the estate must descend as his paternal heirs, in case he continued to hold the fee, (which he shews himself to have recently obtained by the recovery,) and suffered it to pass by descent. He marks his decided preference, with reference to the subject of his intended disposition, of the maternal to the paternal line, by noticing only one link in the one, which sufficiently pointed out who would be his paternal heir; but tracing the other through several links up to his maternal ancestor, *Theophilus Clinton* Earl of *Lincoln* and Baron *Clinton*, marking particularly his own connection of heirship with *Samuel Rolle*, being the only child and heir of his mother, and she the only child and heir of *Samuel Rolle*. Having stated the history of his title to the estate under the will of *Samuel Rolle*, the recovery suffered, and that the uses of it were declared to himself in fee, he proceeds to state his main object, to which all the preceding statement was introductory, anticipating the effect of this acquisition of the fee on the future descent, and marking, in the way of contrast, by the emphatic word, "But," the course of succession, in which he preferably wished the estate to go. "But the said *George* Earl of *Orford* is willing and desirous that the premises should continue and remain in the family and blood of the said *Samuel Rolle*." (a) His anxiety on this subject leads him to repeat the same idea in the witnessing part. "This indenture witnesseth that for and in consideration of

(a) *Vide 2 Barn. & Ald. 627.*, where the deed is stated at length.

the natural love and affection, which the said *George Earl of Orford* hath and beareth unto his relations the heirs of the said *Samuel Rolle*, and to the intent that the manors, &c. may remain, continue, and be in the family and blood of his late mother the said *Margaret Countess of Orford*, on the side or part of her said father." The limitations which follow evidently shew the same intention, and are framed with a view to the same object. He conveys the whole estate to *Joshua Sharpe*, his heirs and assigns, to the uses after limited; and he then declares the uses in the following terms: "To the use and behoof of the said *George Earl of Orford*, for and during his natural life, without impeachment of, and with full power to do and commit any manner of waste on the said premises, or any part or parts thereof, and from and after his decease, to the use and behoof of the heirs of the body of him the said *George Earl of Orford* lawfully to be begotten." Thus far the deed is in exact conformity to the purpose declared in the recital, to secure the continuance of the estate in the family and blood of *Samuel Rolle*. Lord *Orford* having first transferred his whole interest in the estate to his trustee, takes back to himself an estate tail, instead of his prior estate in fee. Being himself the heir of *Samuel Rolle*, his continuing to hold the estate for his life was consistent with this object, which was not to transfer the estate into the family of *Rolle*, but that it should remain and continue therein. The transmission to his issue, if he had any, was also compatible with, and a necessary furtherance of the same purpose, as they, like him, must in succession be the heirs of that family. So long as the estate tail, created by this limitation, continued to exist, no one could succeed to the *Rolle* estate, who did not represent the line of *Rolle*.

1820.

 Marquis
 CHOLMON-
 DELEY
 v.
 Lord
 CLINTON.

That

1820.

Marquis
CHOLMON-
DELEY

v.
Lord
CLINTON.

That Lord *Orford's* sole object in the deed was a transfer of the ultimate fee from himself to the future heir of the *Rolle* family, and that the reduction of his own interest therein, from a fee to an estate tail, was with this object only, is proved by the subsequent limitations. In this settlement of the fee, he took care to part only with the descendible quality, reserving to himself every present right of absolute enjoyment and the full dominion over the estate. Before the limitation of the fee, therefore, he reserves to himself the power of introducing any new uses, which any subsequent event or change of purpose might induce him to prefer, a power perfectly natural and proper, if he meant himself to have only a partial and limited interest in the estate, but wholly superfluous and unnecessary if he had intended a restitution of the fee to himself by the next limitation. The same observations apply to the power of revocation and appointment of new uses, reserved in the largest terms by the proviso which follows the next limitation.

The principal and indeed in a manner the sole purpose for which the deed was made, still remained to be provided for, to which all that had hitherto been done was merely introductory and subservient.

The limitation which follows next is, "in default of such declaration, limitation, direction, or appointment, to the use of the right heirs of the said *S. R.* for ever, and to, for, and upon no other use, intent, or purpose whatsoever." The contingencies upon which the remainder in fee was to take effect, having taken place by the death of *George Earl of Orford*, on the fifth of *December 1791*, without issue, and without having executed any new appointment under the power, or revoked the uses of his settlement, the question is, who became entitled to succeed to the estate under

under the terms of the limitation? "to the right heirs of *Samuel Rolle* for ever, and to no other use, intent, or purpose whatsoever." There is no doubt that the words "right heirs," in this limitation, are words of purchase, and not of limitation, no antecedent estate of freehold having been given by the deed to *Samuel Rolle*. There is no doubt, that in order to take as such purchaser, the person must fully and correctly answer the description contained in the limitation, and consequently, that no person could become qualified who did not possess the character of the right heir of *Samuel Rolle*. But the doubt arises from the subject matter of the limitation: had it been the grant of an immediate estate of freehold in possession, no doubt could have arisen as to the person meant to be designated by the words right heir of *Samuel Rolle*. As the freehold could not be in abeyance, it must have vested, if at all, immediately in the person who was at the time of the execution of the deed the right heir of *Samuel Rolle*. But there does not exist the same necessity in the case of a remainder, which may be granted at the option of the grantor, either as a vested remainder to a present existing character, or as a contingent remainder to one not in existence, or not ascertained, provided such character be in existence and ascertained, at or before the determination of the preceding estate.

The sole purpose and design of the deed was to prevent the estate going in the event and at the period stated, to Lord *Orford's* own paternal heir, and to carry it to his maternal. Upon this point the Master of the Rolls gives his decided opinion, "That Lord *Orford* had the intention which is ascribed to him, (namely, so to settle his estate as to carry it to his relations on the mother's side, in default of issue of his own body,) there can, I think, be no reasonable doubt." The Master of the
Rolls

1820.
Marquis
CHOLMON-
DELEY
v.
Lord
CLINTON.

1820.

Marquis
CHOLMON-
DELEY

Lord
CLINTON.

Rolls shews how incontrovertibly this point is established, by Lord *Orford's* own declaration in the recital of the deed. We have, therefore, according to this great authority, a clear manifestation of Lord *Orford's* intent on the face of the deed, in a way to exclude all reasonable doubt, as to all the points now in question: 1st, the event, for which it was the intent of Lord *Orford* to provide by this settlement, namely, "the default of issue of Lord *Orford's* own body;" 2dly, the description of person to whom he intended his estate should be carried in this event, namely, "his relations on the mother's side;" and, 3dly, the means by which he intended it should be carried, namely, "by this settlement," and, consequently, by the limitation now under consideration, there being no other in the settlement that applies to or has any operation in this event. - It is also clear, as the same authority points out, that "if the limitation operates in the manner contended for by the Plaintiffs, this intention will be wholly defeated; for it will carry the estate to the paternal uncle, who had in him none of the blood of *Margaret Countess of Orford*, *Earl George's* mother." This effect and operation of the limitation follows, as the inevitable consequence of allowing the construction to be governed solely by a rigid application of legal import and presumption. Instead of carrying the estate, as it is admitted it was intended to do, in the appointed period and event, to the maternal in exclusion of the paternal heir, and to no other use or purpose whatsoever, it is made to carry it at that time and event to the paternal, to the perpetual exclusion of the maternal heir; and the estate, instead of being continued in the line of *Rolle*, is for ever transferred out of that line, into another that is a total stranger both in family and blood. On the other hand, upon the assumption that the technical rule respecting vesting does not apply to this case, and that the term "right heirs"

heirs" in this limitation ought, under all the circumstances and notwithstanding the legal presumption, to be construed a description intended to refer, not to the then present time and person, but to the future period and character, viz. the death and failure of issue of Lord Orford, and to the person possessing at *that time and event* the character of right heir of *Samuel Rolle*, none of the mischiefs, admitted to be the consequence of the opposite construction, will take place. The deed will be made consistent, intelligible, and operative in all its parts, an object always to be aimed at, if, by any construction, it can be attained. The intention of the grantor will be carried into execution, in exact conformity to his own recorded and undoubted declaration of it, in co-operation with the plan and effect of the other limitations in the deed.

1820.

Marquis
CHOLMON-
DELBY
".
Lord
CLINTON.

The main difficulties, however, belonging to this case remain to be considered. The question still is, as the Master of the Rolls observes, "Whether the Court can mould the words of the deed so as to carry the intention into execution?"

After the most attentive consideration which I have been able to give to the subject, I cannot say, notwithstanding the unfeigned deference I feel for the preponderance of authority in favour of the construction contended for by the plaintiffs, that I am prepared to adopt and act upon it without further revision. I cannot say that the question is not attended with a sufficient degree of difficulty and doubt to render a further consideration necessary; or that I have myself been able to overcome the objections to the plaintiff's construction. If I had now finally to decide the question upon my own opinion, laying aside all regard to the authority on either side, I feel strongly disposed to concur in the opinion which Mr. Justice Bayley has expressed, in respect to
both

1820.

Marquis
CHOLMON-
DELEY

Lord
CLINTON.

both the points upon which the question has been shewn to depend, namely, the rule of construction applicable to a limitation, such as the one now under consideration, and the intention and meaning of the author of it. I shall state the reasons for this concurrence under both the heads. Under the first, I think, with Mr. Justice *Bayley*, that the rule of construction upon which the plaintiffs rely is not absolute and universal, but qualified and admitting of exception, that it prevails only when the actual intention and meaning is not sufficiently and clearly manifested on the face of the instrument, and ceases to operate when the particular intention and meaning is so manifested. I concur with him that a limitation, by way of remainder, to the heirs or children of a person deceased, is not necessarily confined to such persons, as are within that description at the time that limitation was created. I cannot discover any satisfactory ground why it should be so confined upon principle, and I do not find it established to be so, by any authority before the present case.

In discussing the first question, respecting the application of the legal presumption to the construction of the words "right heirs," in the limitation, in preference to, and in exclusion of all consideration of the intent with which these words are used by Lord *Orford*, and the meaning which he annexed to them, I assume, for the sake of the argument, that under the next head the fact will be made out, that the intention and meaning of Lord *Orford*, was such as Mr. Justice *Bayley* has declared it in his opinion to have been, reserving that point for separate consideration. Unless that fact be satisfactorily established, there is certainly nothing to prevent the operation of the ordinary rule of construction. But those who insist on the binding force of the rule, without regard to intention, and even in opposition

sition to it, if it could be established by the means proposed, must be prepared to go the length of contending for the paramount ascendancy and effect of their rule, even under the admission that a contrary meaning and intention could in fact be established.

1820.

Marquis.
CHOLMON-
DELEY
v.
Lord
CLINTON.

It is clear from the subject of the grant, that the remainder might be given to the person sustaining the character of right heir, at either of two periods, namely, either at the time when the remainder was created, (which person, for the sake of distinction, may be termed the present right heir,) or at the time when the remainder was to take effect on the determination of the prior estate tail (which last person may be termed the future right heir). The description may, consistently with the words, refer to either period, and will, therefore, admit of being referred to either by suppletory inference. In the absence of any secondary proof of intention being afforded by the deed, to supply the meaning thus left imperfect, the law steps in to supply the meaning by presumption, in favour of vesting in an existing present character, in preference to the estate falling into abeyance, with all the other objections to a contingent remainder: but this is only, when the grantor himself has been totally silent on the subject, and has afforded no means on the face of the deed, to discover his meaning on the point in question. If his meaning, (which must be the object of enquiry,) though not communicated in express terms in the operative part of the deed, is communicated in the other parts of it, so that by coupling them with the operative words, the defect may be supplied, and the entire meaning of the grantor, both as to the character and the period referred to in his description, satisfactorily and clearly ascertained, what objection can be made to such a mode of ascertaining the meaning of the grantor? If one part of a deed is dubious or imperfect, why

If the time at which a remainder in a deed is to vest is not ascertained by the limitation itself, it vests immediately in consequence of the legal presumption in favour of vesting estates; but that presumption may be rebutted or controlled by intention collected from the recital of any other part of the deed.

1820.


 Marquis
 Cholmon-
 DELLEY
 v.
 Lord
 Oxford.

may not the other parts be resorted to, to explain it? If the actual meaning thus ascertained, is found not to coincide with that which legal presumption would alone have supplied, the result is, that the meaning in this particular case differs from what upon general principles would have been supposed to be the meaning. If the Court to persevere in adherence to a supposition, when it is in the particular case proved to be ill founded? The legal presumption can only be a presumption of the unexpressed meaning of the grantor, for from thence alone can the title of any person to take as donee be derived. But that presumption, like every other presumption, can avail only till rebutted by proof to the contrary; and in this case the argument supposes that the contrary can be proved by sufficient manifestation, if the other parts of the deed are permitted to be resorted to and coupled with the operative part, and the construction drawn from their united effect. When the real meaning of the donor is ascertained as to the description and character of his donee, how can the Court receive or act upon any presumption of a contrary meaning? To take as a purchaser under a deed, the claimant must exactly and fully answer the description in the grant. How could the present right heir answer the description, which is thus proved to have had reference to the future right heir? On the same principle that the recital in the present case is not permitted, to show the meaning of Lord Oxford in the use of the words "right heirs" in the operative part of the deed, its operation might have been resisted had it contained a direct and express anticipation and disclaimer of the legal construction, and a substitution of the meaning in which the words were intended to be used.

That there does exist a rule of construction applicable to limitations of this nature, in many cases of a peremptory and inflexible obligation, by which
 the

the Court is bound to construe the remainder created by it, to be a vested remainder in the person possessing the character at the time of its creation, is not disputed; neither is it insisted, that to give it that effect the actual intention of the framer of the deed should be manifested by any express word in the limitation. Without any word of present import, the law will supply it by presumption in favor of vesting. It is sufficient that a contrary intent is not expressed or shown. But the question is, whether there is any rule imposing the same obligatory construction, in a case where the terms of the limitation are general, not specifying by any express words whether the character is to be present or future, and when coupling the limitation with the other parts of the deed, the intention in favor of the future character is satisfactorily and clearly demonstrated. The insertion of a single word of future import in the limitation, in addition to the term "right heirs," as the word "then," or any similar expression, would, it is admitted, have prevented the remainder vesting in the present right heir, and make it a contingent remainder to the future heir. Why so? Because the intention of the grantor, thus manifested in express terms, is allowed to govern the construction and effect of the limitation. If intention, then, is the criterion, when thus manifested, why is it not to be so, when manifested equally as to the proof of the fact, and unexceptionably as to the mode of proof in another way? Can the effect which intention, when ascertained, is to have, depend on the mode in which it is ascertained? Can it make any difference, whether it be ascertained by the express or implied sense of the operative words? Here however, care must be taken to attend to the distinction between this and limitations differently worded. In some, the operative words are such as to be capable only of one meaning, and contain in themselves a full, perfect, and unam-

1880.

Marquis
CROFTON-
DAVEY
v.
Lord
CLAYTON.

1820.

Marquis
CHOLMON-
DELEY
v.
Lord
CLINTON.

biguous description of the person or character, without requiring any addition to render it complete, or admitting of any explanation or qualification. In others, as in the present case, the description, if confined to the literal import of the words themselves, is imperfect, and necessarily must have some addition made to render the meaning complete. The description is, on the face of it, ambiguous and equivocal, admitting of two interpretations, without any thing in the words themselves to determine which of the two is the one intended by the framer of the instrument.

Where a limitation in a deed is perfect and complete, it cannot be controuled by intention collected from other parts of the deed.

In the first case, to resort to and to act upon the intention of the framer of the deed, however clearly ascertained, as a guide to determine what should be the meaning and effect of the limitation, would be inadmissible; because it would not be to expound the operative words of the limitation, (which is the proper duty of the Court,) making use of intention to supply or explain the meaning, (neither of which is required in the case put,) but to set up an implied meaning collected from intention, in opposition to the declared meaning afforded by the operative words; to substitute one meaning in the place of the other, in a case where the two meanings are irreconcilably at variance. The Court must decide which of the two is to be preferred, the unexecuted intent, or the solemn act and deed. To prefer the former to the latter, would be doing what the Master of the Rolls so strongly and justly condemns, as a departure from the proper office and duty of the Court, when employed in the exposition of deeds.

But in the latter instance, of a limitation where the words are in themselves imperfect or ambiguous, the case is very different. In such a case resort must be had to matter extrinsic to the limitation itself, for the purpose

purpose of completing and ascertaining the meaning, or the deed would become inoperative and void, which is always, if possible, to be prevented. No alteration is thereby made in the operative words. Their meaning, as far as they are capable of affording any, is adopted, but additional information being necessary to supply the defect, and remove the ambiguity of the description, resort is had to the next best sources of information, viz. the context, and the nature of and circumstances attending the gift, as they appear in other parts of the deed.

1820.
 Marquis
 CHOLMON-
 DELEY
 v.
 Lord
 CLINTON.

Before we can decide upon the true construction of this limitation, it is essentially necessary to consider what the limitation is, as framed by the grantor, and what is the import of the words which it contains, before any addition is made to that import by either of the proposed modes, viz. legal presumption, or manifestation of particular meaning. Is the description contained in it of the right heir to be considered perfect or imperfect? Upon this point there can be no doubt: in whichever of the two modes the defect is to be supplied, the existence of the defect in the limitation, before the application of either mode, is admitted on both sides, and the consequent necessity of some auxiliary means of supplying it. During the discussion, this does not seem to have been sufficiently attended to; the limitation has been represented at one time as imperfect, requiring auxiliary means for its completion, and at another as complete and perfect, and therefore rejecting all explanation of its meaning. In seeking for the aid of legal presumption, to add to the term "right heir," the words "at the time of the execution of the deed," the limitation is necessarily admitted to be imperfect without such presumption; for in the case of an express limitation, perfect in its description, no presumption of any kind could


1820.

Marquis
CHOLMON-
DELEY
v.
Lord
CLINTON.

be required or be admissible. And yet, when the other mode of supplying the defect in the limitation is proposed to be referred to, viz. the manifestation of intent, the reference is resisted on the ground of the limitation being in itself perfect, unambiguous, and explicit. The words "right heirs of S. R.," we are told, are words of plain and well known legal import, and must, according to that import, denote the person who was heir at the time of the execution of the deed. To propose any change from that meaning, is treated as in effect to propose an alteration in the words, as being no otherwise to be effectuated. "It is only because the words in their proper sense will not have the effect of accomplishing the purpose of the grantor, that their meaning is questioned. The argument is only, that the grantor could not have meant to say that which he has plainly said." (a) These observations, it should seem, are such as could only apply to a limitation ranking under the head of one substantially perfect in itself, without any extrinsic aid.

If the words made use of by Lord O. in the limitation had really been such as above stated, if he had in addition to the term "right heirs" inserted the words "at the time of the execution of the deed," all the above arguments against any addition, explanation, or substitution, would have applied. It might then have been properly said, *Quoties in verbis nulla est ambiguitas ibi nulla expositio contra verba expressa ferenda est.* But the force of the argument is greatly diminished, if not entirely taken away, when it is observed that no such words, nor any of similar import, are to be found in the limitation, or in any part of this deed. "*Non meus hic sermo,*" might Lord Orford say. The words which have this im-

(a) 2 BRO. 345.

1880.

 Marquis
 CHOMON-
 DELEY.
 v.
 Lord
 CLINTON.

portant effect are inserted by the expositor: it is the result of the application of legal inference and presumption. But this is taking for granted the whole question, viz, whether this is a case, in which any such presumption ought to be applied. One of the two disputed modes of supplying the defect in the limitation, is thus first resorted to as a matter of course, and then the effect produced by it on the limitation is made the argument for its preferable adoption. There is no doubt that, if legal presumption be applied, the effect will be to render the limitation perfect, clear, and unambiguous. The same may be said of the effect of applying intention as the criterion of explanation; only that the one will make it, a perfect, clear, and unambiguous description of the present, the other of the future right heir. So far both the modes stand on an equal footing; but the preference, due to the one or the other must depend on a different ground.

What is the character of this limitation, previous to the application of either of the modes proposed for supplying its meaning? It is altogether imperfect, and *that* in its main discriminating feature. It is equivocal and ambiguous, and, without some foreign aid extrinsic to the limitation, can afford no guide to determine, which of the two right heirs was intended by the grantor to succeed to his estate. Laying aside inference and presumption, the words "right heirs of S. R." contain a general description of a person standing in that relation to S. R. at some time or other, but not necessarily at any particular time. It is a description of the character in the abstract, applicable to every right heir of S. R. past, present, or future, but not of necessity applying exclusively to any one in particular. The estate did belong to the past right heir: at the time of the deed, was belonging to the then present right heir, and at a subsequent time

1820.
 Marquis
 CHOLMON-
 DELEY
 v.
 Lord
 CLINTON,

would belong to the future right heir. Each is the right heir, but at a different time. Time is the discriminating feature. The character belongs equally to each in succession; time, therefore, or some other characteristic circumstance, must be added when either is to be identified. As it stands, it is a generic not a specific description: it wants all that is to give it particularity and identity; the *differentia*, the *accidens*, (as the dialecticians term it), name, date, or circumstance, to denote what right heir is meant. Without such addition the description is wholly defective, as a guide to fix the person intended. It will equally fit every right heir, but it characterizes no one in particular. It will apply with equal propriety to Lord *Clinton* as to Lord *Orford*; for each, at a different time, was solely, exclusively, and correctly, the right heir of *S. R.* Without some addition, therefore, to the description, no use can be made of it. To such a description, terms importing a freedom from all defect or ambiguity, can with no propriety be applied.

Being the grant of a remainder, there is nothing in the subject of the grant to prevent its being granted, either to the person who was the right heir at the time of the creation of the remainder, or to the person who would be the right heir at the time appointed for its taking effect: the words of the limitation are open to either construction. The grantor has omitted by any express term to signify his meaning on this point, whether the remainder was to be a vested remainder in the present, or a contingent one to the future right heir; whichever party succeeds, he cannot be said to derive his title under, or in opposition to any thing plainly said by the grantor. The grantor has been wholly silent on the subject: what is there that should prevent the Court in the construction of a limitation so imperfect

An imperfect
 limitation
 must be con-

imperfect on the face of it, in its most essential point, from adverting to and being governed by the other parts of the deed, if in them can be found, in respect of this point, a clear and sufficient manifestation of the grantor's unexpressed but implied meaning?

1820.

Marquis
CHOLMON-
DELEY
v.
Lord
CLINTON.

To pronounce on the meaning of a detached part of, or extract from an instrument, without referring to, and comparing it with the other parts of the same instrument, if relating to the same subject, is contrary to every principle of correct interpretation, applied to any written instrument upon any subject; and it is particularly reprobated by all the authorities respecting the construction of legal instruments. *Shepherd*, in his *Touchstone*, mentions it as one of the established rules for the exposition of deeds, "That the construction should be made upon the entire deed, so that one part do help to expound another, and that every part may take effect and none be rejected; that all the parts do agree together, and there be no discordance therein." We are to look (as it has been expressed,) at the four corners of the instrument, and not to judge *per parcella*.

strued by the meaning and intention collected from the whole of the deed taken together.

The legal presumption in favour of the present right heirs, does not proceed on the ground of particular intention, but on principles of general application. It will prevail in the absence of any proof of a particular intent, or when that is not very clearly and sufficiently manifested. But when that is manifested, it is contrary to all principle, that presumption should be allowed to operate in opposition to direct proof.

In construing a deed, legal presumption can only prevail in the absence of a contrary intention, or where that is not manifested with sufficient clearness.

Every absolute owner of an estate has a right to dispose of it in any manner, and to any person or character he thinks fit, taking care only, in the exercise of his

1836.

Marquis
CROMERON
v.
Lord
Oxford.

his right, not to violate any rule of law. In the choice of his donee, he is under no restraint, he may require from him the possession of any qualification or character, however novel and whimsical, as, in a reported instance of a gift to the first person who should come to St. Paul's. The law only requires that he should specify his appointment in terms sufficiently clear and explicit to enable the Court to discover with certainty who the person or character is whom he intended to appoint. The law cannot interfere further than to discover, by sound exposition, the intention of the grantor, and to give effect to it, provided it be agreeable to the rules of law.

Had this been the grant of a present estate in possession, it must have vested immediately on the execution of the deed; and therefore, if given to a right heir, would only have been given to the then present right heir. This is not so in the case of a remainder, where the complete title to, and enjoyment of the estate cannot be transferred till the period and event fixed for the remainder to vest in possession. By that time, the person or character to whom the remainder is given, must be in existence and ascertained, but he need not be. The right, however, to the future estate may, and the law prefers that it should immediately vest in some existing person or character, the moment that it passes out of the grantor, and not continue in abeyance, till the period and event is arrived for the remainder to take effect in possession. But it is wholly at the option of the grantor, to determine to which of those descriptions of person or character, his estate shall go at the appointed time.

If therefore, it is found that the mind of Lord Oxford, as declared by his deed of gift, was that the
remainder

remainder should, at the appointed time and event, go to the succeeding right heir, and not to the present, by that declaration the right must be conclusively bound. The mind, however, of the grantor must be clearly and sufficiently made known by his deed, in the expounding of which, the Court is bound to adhere to established rules of exposition, from which it never ought to depart, to favour the exigency of a particular case, however urgent the call may be. These rules require that certain forms should be observed, especially in deeds; and it is of infinite importance, in order to afford a certain permanent and fixed guide in the titles to real property, that these forms should not be sacrificed from any feeling of the hardship that may be produced in a particular case. It was the desire to preserve inviolate the great landmarks of real property, that seems to have operated on the majority of the great authorities in this case, requiring a rigid and inflexible adherence to what they considered to be an established rule of construction.

But what are the established rules for the exposition of deeds, and what the limits imposed by them to the adherence to technical terms? For the reasons before mentioned, they are required to be observed to a certain extent, but never so as to interfere with the more important rules, in favour of what Lord *Hardwicke* terms the truth and justice of the case.

The real intention of the framer of the deed, the written declaration of whose mind it is always considered to be, is the end and object, to the discovery and effectuating of which all the rules of construction, properly so-called, are uniformly directed. When technical words or phrases are made use of, the strong presumption is, that the party intended to use them according to their correct

1880.
Marquis
CROMBIE
DELEY
v.
Lord
CLINTON.

1820.

Marquis
CHOLMON-
DELEY

v.
Lord
CLINTON.

correct technical meaning; but this is not conclusive evidence that such was his real meaning. If the technical meaning is found, in the particular case, to be an erroneous guide to the real one, leading to a meaning contrary to what the party intended to convey by it, it ceases to answer its purpose. The deed may be drawn inartificially, from ignorance or inadvertence, or other causes, but still, if there is enough clearly to convey information as to the real meaning, the object is attained. The mind is with certainty discovered, and being known, must be the guide, or the act and deed would be not the act and deed of the party, but of the Court. Because the words, which are the signs of the ideas of the persons using them, are in general, and in the correct use of them, the signs of ideas different from those of which, in the particular case, they are found less technically and correctly, but with equal certainty, to be the signs: can it follow that they are to be construed, to represent the ideas of which they are known not to be the signs, in preference to those of which they appear to be the signs? Where is the authority that compels the Court to go this length in its adherence to technical meaning? The contrary has been long and universally established to be the rule by the highest authorities from the earliest period, without a single one to the contrary. Many cases may doubtless be found, in which technical meaning has been allowed to prevail, notwithstanding some appearance of a contrary intent; but this has been where the manifestation of intent was not deemed sufficient, to get over the presumption in favour of legal construction. The paramount regard to be had, in a case circumstanced as the present, to the meaning and intention of the grantor, in preference to technical meaning, is the settled rule of construction.

Words of description to be construed ac-

If the subject of the instrument, on which the question arises be one that is not matter of law, (over which intention

tention has no controul), but depends wholly on the will and act of the party, such as the appointment by a donor in a deed of gift of his own donee; if the words to be construed are not words of limitation, (in which a stricter attention to forms may be required, especially in deeds,) but words of purchase and description made use of to designate the person of the first taker; in such case, if the meaning and intention of the grantor be clearly manifested on the face of the instrument, as to the person or character intended to be the object of grant, and if the words which he has made use of to convey his meaning will admit of an interpretation conformable to it, though contrary to their correct technical sense, there is no case or dictum to be found which requires the Court to adopt the technical sense, in opposition to the actual meaning the party: on the contrary, the authorities uniformly demand the preference to be given to intent, over technical import and form.

These principles are sanctioned by all the authorities: they will be found in the rules laid down by *Shepherd*, in his *Touchstone*, for the construction of deeds, and in the cases by which he illustrates them. The case in which a grant in fee by a lord, of the services to a person, who is tenant for life, although it may enure by way of release and extinguishment, shall, *because this is contrary to the intent*, be taken for a suspension only of the services during the life of the tenant for life; and also that, in which a grant by tenant for life to a stranger for life, is held an estate during the life of the grantor; and the other instances, where general words in a grant will be restrained, contrary to their legal import, to prevent forfeiture, are strong and decisive authorities in favour of these principles, and apply directly to the present case. In all those cases the limitation was expressed in terms, the sense of which was at least as unambiguous, and

1820.
Marquis
CHOLMON-
DELEY
v.
Lord
CLINTON.

According to the intention, if clearly manifested on the face of the deed, though contrary to their correct technical sense.

1820.

Marquis
CHOLMON-
DELEY
v.
Lord
CLINTON.

ing from some or other of those great fundamental principles;" and adds, " But some of these rules, of the second and third class, are rules of a more flexible nature than those of the preceding kind, and admit of many exceptions; whereas those admit of none. For, if the intention of the testator be *clearly* and *manifestly* contrary to the legal import of the words, which he has thus hastily and unadvisedly made use of, the technical rule of law shall give way to this *plain* intention of the testator. This has been clear law for four centuries at least, if not longer. It is said by the Judges, in 9 Hen. 6. fol. 24. that a devise is *marvellous* in its operations; and many instances are given, where it may countervail the ordinary rules of law. The like doctrine is to be met with in every reporter since, and is the same that obtained in equity for the construction of uses before the statute. In the case of uses (says Lord Bacon (a)) the Chancellor will consult with the rules of law, where the *intention* of the parties does not *specially* appear. But then, this intention of the testator, which is to ride over and controul the legal operation of his own words, must be "*manifest and certain, and not obscure or doubtful,*" as was resolved by all the Judges of England in *Wild's* case (b): or, according to the emphatical words of Lord Hobart, "*the intent must not be conjectural, but by declaration plain*" (c): which words of Lord Hobart, as they are adopted and construed by Lord Hardwicke, in *Garth and Baldwin* (d), must mean, "*plain expression, or necessary implication of his intent.*" But if that intent be uncertain, if it be in *æquilibrio*, or even in suspense or doubt, then (he afterwards adds), the legal operation of the words must take effect."

(a) *Of Uses*, 306., 8vo. edit.

(b) 6 Rep. 16.

(c) *Ibid.* 33.

(d) 2 Ves. 646.

The judgment of Mr. Justice *Blackstone* is founded on these principles. He divides the case into two heads: 1st, "What is the legal and technical import of the words made use of in this devise;" next "whether there is any *plain* and *manifest* intention of the testator to be gathered from any part of his will, which may controul and over-rule the legal operation of the words, and at the same time be consistent with the fundamental and immutable rules of law."

1820.
Marquis
CHOLMON-
DELEY
v.
Lord
CLINTON.

He states the reasons which in that case induced him to be of opinion, that there was not a sufficient manifestation of intent to controul the legal operation of the words. But a judgment so founded virtually decides in favour of a contrary result, when the intent is sufficiently manifested, and is an authoritative recognition of the qualified nature of the rule in favour of legal and technical import. The only distinction that can be taken between that case and the present, is, that the one arose upon a will, the other on a deed. But the rule of construction to be applied to a subject like the present, to ascertain the meaning of words used by a donor to describe the person of his donee, must be the same in both cases. Intention is equally the guide in both. This is proved by the rules and cases cited from *Shepherd*, and it is expressly stated by Lord *Mansfield*, in *Goodtitle* d. *Weston* v. *Burtenshaw*, that, with the exception of its being required that legal words of limitation should be technically expressed, the Courts are as much bound to give effect to the intention of contracting parties in a deed, as to that of a testator in a will. I conclude, therefore, that the judgment of Sir *William Blackstone* in *Perryn* v. *Blake*, affords another decisive authority, that in the construction of the words "right heirs" in the present case, the intention of Lord O. to describe the future right heir, if sufficiently manifested,

VOL. II.

H

must

1820.

Marquis
CHOLMON-
DELEY
v.
Lord
CLINTON.

must get over the legal operation of the words in favour of the present right heir. These authorities, I should have thought, would have been deemed sufficient. But, considering the magnitude and importance of the case, and of the principle now under consideration, and the great weight and deference due to the contrary opinions, I shall proceed further in the consideration of the authorities cited on this leading point, particularly those referred to in the able judgment to which I have been called upon to direct my attention.

The opinion of Mr. Justice *Buller*, in the case of *Ambrose v. Hodgson* (a) has been cited and relied upon on both sides, and certainly there have been few Judges better qualified by acuteness of mind, legal research, and experience, to form a correct judgment on such a question as the present; but if the whole of the opinion of this learned Judge is considered, it will be found to add another decisive authority for the limited and qualified extent of the rule in favor of technical meaning. In *Philipps v. Garth* (b), Mr. Justice *Buller* refers to his opinion given ten years before in the above case, and again recognizes the doctrine which he had there laid down, and states that, although, when technical phrases are used, the Court is bound to understand them as such, yet, "if the testator uses other expressions in other parts of the will, which shew he did not mean to use those phrases technically, then the intention must prevail."

Lord Chief Justice *Willes*, in delivering the opinion of the Judges in the House of Lords, in the case of *Parkhurst v. Smith* (c), introduces it with a reference to the general rules stated by *Shepherd*, and amongst these

(a) *Dougl.* 337.(b) *Brown*, 68.(c) *Willes, Rep.* 352.

to the one that the construction of deeds ought to be favourable, and as near to the apparent intent of the parties as possibly may be, and as the law will permit; and he refers to the judgment of Lord Chief Justice *Hobart*, in *Earl of Clavrickard's case* (a), which also strongly marks the care that has been taken by the Judges in all times to discover, and to carry into execution, the real intention of the parties.

1820.
Marquis
Chalmers-
Dale
v.
Lord
Clinton.

It has been insisted, that the rules stated by Lord Chief Justice *Wilkes*, do not apply to such a case as the present, but only to a deed, the words of which are doubtful; whereas in this limitation the words are unambiguous, and the legal effect clear. But this observation I have already considered. The ambiguity, in the present case, arises not from the words of which the limitation consists, but from the omission of some other word to give certainty and particularity to a general description; and this ambiguity is certainly as great as any that could have been created by doubtful expressions. If no limitation could be considered doubtful and explicable by reference to intent, which the application of legal operation and effect would render clear and unambiguous, no limitation would ever be open to explanation by intent.

The opinion of Lord Chief Justice *Holt*, in the case of *Bath v. Montague* (b), was referred to, in confirmation of an argument that had before been insisted upon, that the effect of a deed does not depend on the recital, but on the limitations contained in the operative part, from whence alone the effect and operation is to be collected. The passage in Lord *Holt's* judgment is as follows: "The reciting part of a deed

(a) *Hob.* 275.

(b) 3 *Ch. Ca.* 106.

1820.

Marquis
CHOLMON-
DELEY

v.
Lord
CLINTON.

is not at all a necessary part, either in law or equity. It may be made use of to explain a doubt of the intention and meaning of the parties, but it hath no effect or operation. But when it comes to limit the estate, there the deed is to have its effect according to what limitations are therein set forth. And that is plain and full, without any manner of contradiction whatsoever." But this opinion of Lord *Holt*, instead of being an authority against the use made by the defendants of the recital in the deed of 1781, is when properly considered, an authority in favour of it; because in that case there was a direct and irreconcilable variance between the recitals in the deed, and the express limitations contained in it. The deed, Lord *Holt* observes, "doth say, it was made and intended to confirm the will, and yet makes several recitals and limitations contrary to it, disposing of the estate in terms express and positive, quite otherwise than the will doth." Had the limitations in the present deed been equally express and unequivocal, equally irreconcilable with the recital, had it for instance, expressly given the remainder to the right heir at the time of the execution of the deed, the case of *Bath v. Montague* would have been applicable.

In the case of *Moore v. Macgrath* (a), Lord *Mansfield* and the Court of King's Bench considered themselves at liberty to go a step further in favour of intention collected from the recital in a deed, and to permit it to overcome general words in the limitation, even though expressly importing a different meaning. In that case, the grantor being seized of an estate in right of his wife, in the counties of *Mayo* and *King's County*, and also of a paternal estate in three other counties, in the recital of the deed of what he was about to settle, specified only the

(a) *Cowp.* p. 9.

estate held in right of his wife, but in the granting part, after a particular specification of the estate in *Mayo and King's County*, he added, "Together with all other the said *Michael Morris's* lands, tenements, and hereditaments in the kingdom of *Ireland*." The Court decided unanimously, that the paternal estate did not pass; and Lord *Mansfield*, in giving judgment, makes this observation: "The deed begins with the preamble usual in all settlements, that is, by reciting what it is that the grantor intends to do; and that, like the preamble to an act of parliament, is the key to what comes afterwards." Though the literal meaning of the words was free from any doubt, the Court did not consider themselves precluded from examining into, and acting upon, the real intention, as it might be collected by inference from the language of the recital, in opposition to the express import of the words.

1820.

 Marquis
 CHOLMON-
 DELEY
 v.
 Lord
 CLINTON.

I conclude from these authorities, (to which many more of similar import might have been added,) that the law on this subject is completely settled, and the rules of construction, both of deeds and wills, established in a way not to be shaken: that though there is always a strong presumption in favour of technical meaning and inference, yet it is no more than a presumption; that it is not necessarily and universally binding and conclusive, but subject to be controuled by the manifestation of a contrary intent: that the primary object of enquiry is the intention of the party; and that where that is, on the face of the instrument, clearly and satisfactorily ascertained, and found not to be contrary to any rule of law, the Court is bound, if the words will admit of a construction conformable to the intention, to adopt that construction, however contrary it may be to technical meaning and inference.

1820.

Marquis
CROMWELL
DELEY
v.
Lord
CANTON.

Before I quit this subject, however, it will be proper to consider the two cases, which are cited in the printed report of the judgment of the Master of the Rolls in support of his opinion. The one of these is the case of *Goodtitle* on dem. of *Bailey v. Pugh*. The other the case of *Seymour v. Boreman*.

The question in the first of these cases turned upon the construction of a clause in a will, by which the testator, after the decease of his wife, and for want of heirs of the sons of his son (to which sons he had limited his estate), devised it over in the following terms: "To the right heirs of me the testator *Calvert Bear* for ever, my son excepted, it being my will he shall have no part of my estate, real or personal." The testator left this son and three daughters, and upon the death of the son without issue, the question was, whether, on the death of the testator, this remainder in fee had past to the daughters under this devise, or, for want of being disposed of, had descended upon the son and heir at law. The Court of King's Bench thought that the words entitled the daughters to take as *personae designatae*, and accordingly decided in their favour. The House of Lords were of a different opinion, and considered that the daughters were not sufficiently described by the words which the testator had used. They thought the will was wholly inoperative: that though the son was excepted from the inheritance, yet that the will contained no devise to any one except to the right heirs of the testator, and consequently could not entitle any one to take under it by devise or purchase. Considering the ground on which this case was decided, it is difficult to see how it can have any bearing on the present. The principle by which the present case is to be governed, never did or could come under consideration. It was no conflict like the present, between manifest intention and technical

technical meaning or inference, nor any instance of the predominance of the latter over the former. There was no intention expressed with respect to the daughters, and that which was declared with respect to the son, in consequence of his being the heir at law, was of no avail.

1820.
Marquis
CHOLMON-
DELEY
v.
Lord
CLINTON.

The Master of the Rolls seems not to have adverted to this important difference between the two cases. He appears to have considered the intention equally manifested in the one case as in the other, and that there were no greater obstacles to carrying it into execution. But his mode of reasoning does not appear to me to make out either of those propositions. "That the testator (he observes) could not mean his son to take under the denomination of right heir, is at least as manifest, as that Lord Oxford did not mean to limit the estate to himself, under the appellation of the right heir of *Samuel Rolle*. The alteration suggested, as expressive of the testator's intent, in that case was not at all stronger than that which is here proposed. It was as easy to say, that the testator meant such person as would be right heir if his son were dead, as to say that, by the limitation in this case, is meant such person as would have been right heir if Lord Oxford had been dead, or such person as should be right heir at his death, or such person as should be right heir on the failure of his issue." (a) The mistake in this comparative view of the two cases appears to arise, from not sufficiently considering how differently they are circumstanced, as to the main feature in both; viz. the manifestation of intention, by which the construction is to be governed. To prove an analogy between the two cases, it should have been shewn, that the testator

(a) 2 Mer. 349.

1820.

Marquis
CHOLMON-
DELEY

v.
Lord
CLINTON.

in the one case had manifested the same intention in favour of his daughters, as Lord *Orford* has in the present case in favour of the future right heir. But this is not attempted to be shewn, nor could it be. The judgment of the House of Lords decisively negated the existence of any such intention; and on this head the Master of the Rolls is silent. The intention, to which his observation is confined, is of a totally different nature, and applies to a different object. It is the intention of the testator to exclude his son from the inheritance; not an intention to devise it to his daughters. This intention is certainly very explicitly declared, and was not defeated or interfered with by the House of Lords, so far as it could by law operate; but this intention, circumstanced as that case was, could not affect the title of either of the contending parties. It could not establish the devise to the daughters, nor take away the right of descent from the son.

The present case differs in both these respects. The manifestation of Lord *Orford's* intention not to limit the estate to himself, under the appellation of the right heir of *Samuel Rolle*, is alone, when established in fact, decisive of the title of both the contending parties; because both claim under the application of those words, neither having any other title. When, therefore, the words (which must have been intended to apply either to the one or the other, and which may apply to either) are ascertained not to have been applied to one of the right heirs; not only is the title of the party claiming under that application thereby negated, but the words being, by necessary implication, made to apply to the other right heir, his title becomes established.—*Exclusio unius est expressio alterius*. The negative intention would, therefore, circumstanced as the present case is, be alone decisive of the whole question, if there were no proof

1820.

Marquis
CHOLMON-
DELEY
v.
LORD
CLINTON.

proof of any other. But that is not the case. The intention of Lord *Orford*, in favour of his maternal heir, and his design to settle the estate upon him, in the event of his (Lord *Orford*'s) dying without issue, is admitted to be a fact upon which there can be no reasonable doubt. Here, then, the intention is proved both positively and negatively, and either would alone have been decisive of the case. On the subject of intention, therefore, the cases appear to be entirely dissimilar. There is an equal dissimilitude under the next head of comparison. In the one case an alteration is proposed both in the words and meaning of the framer of the instrument. In the other there is no alteration of either. The words proposed to be substituted, in the place of those which the testator had made use of, were not such as were synonymous, differing in form, but agreeing in substance. They contain a meaning totally different. Under one set of words no person (according to the decision of the House of Lords) took any estate by devise or purchase. The effect of the substituted words, would have been to enable the daughters to take the estate by purchase. The meaning of the former, therefore, is directly contrary to that of the latter. No such alteration, or any other, either in the words or meaning of the grantor, is proposed to be made in the present case. No word is changed, nor the meaning of any word; but the addition to the meaning, which technical inference would in general raise in such a limitation, in the absence of any proof of a contrary intent, is in this instance made to give way to the clear proof of contrary intention, in conformity to what has been shewn to be, under such circumstances, the settled rule of construction.

In the other case of *Seymour v. Boreman*, a son of the second marriage claimed to take, under the appella-
tion

1820.

Marquis
CHOLMON-
DELEY
v.
Lord
CLINTON.

tion of heir male of the body of the father and mother, while there was a son of the first marriage living. The Lord Keeper said the limitation was defective at law, and the Plaintiff could have no remedy there; but according to the true meaning of the marriage-agreement, he was well described to take the rent. From whence the Master of the Rolls infers, that it was by virtue of the contract only, that the Court was enabled to put upon the word "heirs," a sense which legally and strictly it did not bear. But in the present case, he says, there is no contract enabling the Court to deal with the words according to the original intention of the parties. The first answer to this case is, that supposing the report from whence this account of it is taken to be correct, and the ground on which the party claiming under this description had failed at law, and brought his case into equity, to have been what the Lord Keeper says it was; supposing, too, that the decision of the court of law had never been shaken by any subsequent authority, yet it would not have applied to the present case, because in this no such question arises. It is not contended on behalf of Lord Clinton, that any use or application of the term "right heirs" should be made in his favour, different from what it correctly and properly bears; the only dispute is as to the time to which the description refers.

Although the decision that it is not necessary to be very heir, to enable a person to take by purchase, under the description of heir-male or heir-female, would not, if it had continued to be the rule of construction, have applied to the present case, yet a contrary decision on that point affords a strong authority the other way, for it presents a strong instance of the predominance of intent over technical meaning, and even over a fixed rule of construction. But the point has been long settled, in

in a class of cases, of which *Seymour v. Boreman* is one. If the person to whom the description was intended to apply be ascertained, the necessity of being very heir has long been dispensed with. The case of *Pybus v. Mitford* in 1675, in which the opinion of Lord Hale was delivered in a court of law on this point, in the construction of a covenant to stand seized (a), arose only a few years after the case of *Seymour v. Boreman*, which case was not cited; and Lord Hale refers to a former case decided the same way in the time of Elizabeth. In the case last observed upon (*Goodtitle* dem. *Bailey v. Pugh*) Lord Mansfield, in the year 1784, considered the point to be settled. The point was decided in 1770 by the Court of King's Bench, in *Wills v. Palmer*, (b) after three arguments, not in a contract, but upon a will. So by the Court of Common Pleas, in *Baker v. Wall* (c); by the Courts of King's Bench and the Exchequer, in the case of *Evans* dem. *Burtenshaw v. Weston* (d), in 1774, after three arguments in each Court; and in *Darbison v. Beaumont* (e), in 1713, by the House of Lords.

1820.
 Marquis
 CHOLMON-
 DELEY
 &
 Lord
 CLINTON.

The learned editor of *Coke Littleton*, in an able review of all the cases on this subject, strongly contends for the contrary doctrine, upon the authority of the case of *Counden v. Clerk* (f), and other cases prior to those above cited. But he admits it to be established by the same authorities, that the rule, though established, would give way if from the circumstances of the case a contrary intention appeared; and he endeavours to reconcile the antient authorities by that

(a) 1 Ventr. 378.

(b) 5 Burr. 2615.

(c) Lord Raym. 185. 1 Stra. 41. (d) Fearn. Cont. Rem. App. 370.

(e) 1 P. W. 229. 1 Bro. P. C. 489.

(f) Moor, 360. Hob. 29. Jenk. 294.

distinction

1820.

Marquis
CHOLMON-
DELEY
v.
Lord
CLINTON.

distinction. He states particularly that it was on this ground Lord *Hardwicke* affirmed the decree of Lord *Cowper*, in *Newcomen v. Barkham*. His Lordship, he says, admitted Lord *Coke's* distinction to have been long ago established, and professed to determine wholly on the special circumstances, without the least intention of impeaching the general rule. The conclusion drawn by the editor from all the cases is, that the rule had prevailed, where the construction rested singly on the words "heirs female," and they stand unexplained by any other words or circumstances.

From this review of the cases on this subject, it is evident that, in respect to the principle on which the construction of the present case depends, they all concur in its establishment. In opposition to the doctrine, supposed to prevail in a court of law at the time of *Seymour v. Boreman*, that without a contract, the necessity of being very heir could not be dispensed with, in a person claiming to take by purchase, the contrary is now clearly shewn to be settled, by an uniform train of decisions, and a strong authority is thereby furnished for dispensing, even in a court of law, with technical strictness, when, on the whole, the person appears to correspond with the description. And even in the cases that have recognized the rule as most peremptorily established, still it is admitted to be subject to the qualification contended for in the present case; the warmest advocate for the binding force of the rule, does not contend for its operation, further than where the technical words stand unexplained by any other words or circumstances.

Under the same head other cases might be cited, where persons have been allowed to take by purchase, under the word "heir," though not answering the techni-

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cal sense of that word, such as *Long v. Beaumont* (a), *Goodright* dem. *Brocking v. White* (b), *Burchett v. Durdant*. (c)

1820.
Marquis
CHOLMON-
DELEY
•
Lord
CLINTON.

The remaining argument for construing the term "right heir" in this limitation to be the person answering that description at the time of the execution of the deed is, that such construction is necessary, in order that the remainder created by this limitation may become a vested remainder. The answer to the argument derived from this consideration, is the same that has been given to the general argument, derived from legal import and construction. It applies only to a case in which there is no sufficient manifestation of the particular intention. Whether a remainder is vested or contingent, must in every case depend on the previous question, whether the person to whom, or the event on which it is given, is certain and determinate, or uncertain and contingent; and that must always depend entirely on the will and act of the grantor. The Court has no rule by which it can beforehand determine who shall be the donee, or on what condition or event. It has only to find out what is in each case the meaning and intention of the grantor on each of those points; the option and exclusive right of decision resting wholly and absolutely with him. However strong the predilection of the law is in favour of a vested over a contingent remainder, yet if the intention of the grantor sufficiently appears to give the estate, (as he may do) to a person or character not yet *in esse*, or ascertained, or upon a contingent event, the consequence necessarily follows that the remainder becomes contingent. It cannot become vested without an alteration in the terms of the grant, which the Court has no power to make. Vest-

(a) 1 P. Wms. 229. (b) Bl. Rep. 1010. (c) 2 Vent. 211.
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1822.

Marquis
CHOLMON-
DELEY
v.
Lord
CLINTON.

ing, vested, or contingent is the consequence, not the cause, of the description of person or event in the grant. It is to reverse the order of things, to argue that the person or event should be fixed and certain, because the remainder is vested. The converse is the case. It becomes vested, because granted to a fixed person and on a certain event.

It is true, that the policy of the law is, on many accounts, in favour of vesting, to prevent abeyance, to facilitate family arrangements, to secure the remainder for the person intended to be the donee, and prevent the intention of the grantor being defeated by forfeiture and other means. There is, therefore, always a bearing and presumption in favour of vesting, which will always determine the construction, when there is nothing either in the words of the instrument, or the circumstances of the case, to shew a contrary intention. But there the effect of this presumption ends. It is never allowed to operate in any case, in which the intention of the grantor is sufficiently manifested. If the particular intention does not appear; if the *indicia* of intention stand in *equilibria*, if the words will admit of either construction, the law will always imply the intention to have been that which is most beneficial to the grantee, and most agreeable to the policy of the law. But that presumption cannot take place, if a contrary intention appears, express or implied, either in the words of the instrument, or the circumstances of the case. Those must be first examined, and their effect ascertained. If, therefore, in the present case, the manifestation of intent is established, as to the person to whom the remainder was given, if it be proved that Lord Oxford meant by the terms of the grant to give it to a right heir not ascertained at the time of the grant, but who would be when the remainder was to vest in possession,

possession, no predilection for, or presumption in favour of vesting, can operate to change the person of the donee, or make the remainder vest in the person answering the right heir at the time of the deed. The question, therefore, of vested or contingent, resolves itself into and becomes dependent on the same point, which has been already considered, viz. the manifestation of the grantor's intention in respect to the person designated to be his grantee.

1820.
 Marquis
 CHOLMON-
 DELEY
 v.
 Lord
 CLINTON.

It is said that, if we read this limitation, without knowing who the person was that at the time answered the description of right heir, all would agree that it was a vested remainder in the then existing right heir; and generally, that a remainder to the heir of a deceased person is considered by every lawyer, and treated of in every book, as a vested remainder in the then existing heir. So it unquestionably is, if the limitation is considered nakedly by itself, without taking into consideration the other parts of the same instrument, or the circumstances of the case, from whence the legal presumption in favour of vesting may be rebutted, and a contrary intention shewn to exist. And herein may be traced the cause of all the difference of opinion, that has prevailed in respect to the construction of this limitation. It will be found to proceed entirely, from the difference in the mode of considering the limitation, whether the attention is confined to the terms of it, without reference to the other parts of the deed, or the peculiar circumstances of the case, the character in which the grantor himself stood, the occasion of making the deed, and the object and purpose to be effectuated by it, from all which the intention of the grantor in this particular case is to be discovered; or whether, in ascertaining the construction, not only the terms of the limitation, but likewise all these

1820.

Marquis
CHOLMON-
DELEY
v.
Lord
CLINTON.

these other circumstances are taken into consideration. The result of the former mode leads to the construction of the limitation being a vested remainder in the person answering the description of right heir at the time of the execution of the deed; of the latter, that of its being a contingent remainder to the person who should answer the description at the time, and in the event to which the limitation was evidently meant to refer. All the authorities upon this subject are in unison with this doctrine. The legal presumption in favour of vesting is never carried further. It is always a secondary and subordinate rule to that in favour of intention. The primary enquiry in every case is as to intention.

For the general principle the counsel on both sides refer to the case of *Doe v. Maxey*, (a) in which, Mr. Justice *Bailey* says, "it is a settled rule, not to read a limitation in a will as being a contingent remainder, *unless such appears clearly to have been the intention of the testator*; but if it will admit of being considered as a vested remainder, the Court will always read it as such, because a contingent remainder is always liable to be defeated, and the intention of the testator thereby frustrated." The decision in that case proceeded entirely upon intention, and recognizes the qualification of the rule in favour of it. The certificate of the same learned Judge in the present case, affords a strong practical illustration of the mode in which the rule is to be applied.

Bacon's Abridgement, vol. v. p. 735., 2 *Rolle's Abridgement*, 415., 1 *Coke's Rep.* 95. and 103., and *Plowden*, 56., all stating that "where an estate is limited either by

(a) 12 *East*, 604.

1820.

Marquis
CHOLMONDLEY
v.
Lord
CLINTON,

common law, or by way of use to one for life, or in tail, remainder to the right heirs of J. S., who is then dead, it is a good remainder, and vests presently in the person who is heir at law to J. S. by purchase," prove nothing but what is before admitted to be the general effect of such a limitation of a remainder to the heirs of a deceased person, considered by itself, without any other words or circumstances, from whence a different intention can be collected. There is, in such a case nothing to shew a future heir to have been referred to, except that the estate is not to go over to him till a future time; but that is a circumstance common to every remainder, and does not prevent the immediate vesting in interest, and consequently is not alone sufficient to get the better of the general presumption. But these authorities, for the reasons before given, do not determine, or in the least affect the present case. To sustain the point contended for by the plaintiffs, cases should have been adduced, in which the presumption in favour of vesting was determined to prevail, notwithstanding, and in opposition to the circumstances of the case, and the other parts of the instrument, by which it was manifestly proved that such presumption would be contrary to the clear intention of the framer of it. On the contrary, it will be found established by all the authorities, that an intention clearly manifested not to vest, will controul the *prima facie* legal effect of a limitation, which taken by itself would create a vested remainder.

The effect of a limitation in a deed, which taken by itself would *prima facie* create a vested remainder, will be controuled by a contrary intention clearly manifested.

Every case in which, notwithstanding the limitation of that nature, a reference to intent has been admitted as the criterion to determine the question of vested or not vested, whatever may have been the decision, is an authority for this purpose. In *Pyot v.*

1820.

Marquis
CROLMON-
SELEY
v.
Lord
CLINTON.

Pyot, (a) Lord *Hardwicke* seemed to consider the description of the nearest relation of the *Pyots* to refer to the time of the contingency happening, and to apply to such persons as should then be the testatrix's nearest relation of the *Pyots*. In *Bon v. Smith*, (b) the resolution that the daughter, if unmarried, would have taken under the limitation of the remainder to the next of the testator's name, in preference to the son, to whom an estate tail had been given, must have been founded on the manifest intent of the testator controlling the legal import, by which the remainder would on his death have vested in the son. The answer to the *dictum* in *Jobson's case*, (c) as to what would have been the decision had the daughter been unmarried at the time of the testator's death, is that there was nothing which could in that case have operated to prevent the remainder becoming vested in her. *Teynham v. Webb*, (d) though distinguishable from the present case, as relating to the vesting of portions, is yet a strong authority on this subject, as shewing the necessity, in the opinion of Lord *Hardwicke*, of considering the circumstances of the case, in order to determine the period at which vesting should take place, to answer the intention and object of the deed. Lord *Hardwicke* begins with observing (what he states to be a material part of the case), that there is no particular time mentioned in the deed at which the portion is to vest: it is left at large, and must arise from construction. He then mentions four periods of vesting, and examines each by the test of their answering the intent of the grantor. As to one period, the execution of the deed, he says, "To construe this to relate to the time of the execution of the deed, and to vest then, would be

(a) 1 *Ves. sen.* 335.(b) *Cro. Eliz.* 532.(c) *Cro. Eliz.* 576.(d) 2 *Ves. sen.* 198.

absurd,

absurd, and plainly defeat the intent." As to another, he says, "The consequence would be contrary to the intent of the parties," and therefore he rejects it. As to a third, he thinks there would be a great deal of inconvenience in adopting it; and therefore he does not adopt it. And he finally concludes in favor of another period, in order to avoid all the inconveniencies, and many absurdities, which, he says, would arise from construing this money absolutely vested at any of the other times?

1820.

 Marquis
 CHOLMON-
 DELEY
 &
 Lord
 CLINTON.

In *Phillips v. Deakin*, (a) the Court, upon the ground of intention, decided that the limitations were contingent and suspended till the prior estates should be determined; and the counsel on both sides, *arguendo*, considered the question of vested or contingent, to depend upon the intent of the testator, with a strong presumption only in favour of vesting.

The question as to the effect of legal import, and the presumption in favour of vesting, and as to the period of time to which the description of heir should be referred, where there are no words of gift fixing any particular time, came under the consideration of Lord Abinger, in the case of *Holloway v. Holloway*, (b) and though that great Judge decided, that in that case the remainder vested in the persons answering the description of heirs at the time of the death, yet it is evident from the reasoning used in the judgment, that he considered the question to depend entirely upon intention, and that his decision in favour of the legal presumption proceeded entirely upon the ground, that there was not a sufficient manifestation of a contrary intent. The whole of the judgment is important, and

(a) 1 *Mau. & Sel.* 744.

(b) 5 *Ves.* 399.

1820.

Marquis
CHOLMON-
DELEY

v.

Lord
CLINTON.

towards the conclusion of it his Lordship observes, "I cannot, upon that ground alone, that the daughter named in the will was one of the heirs at law, hold that heirs at a particular time were intended. My opinion is, *that there is not enough in this will to give the words any other than their primâ facie construction*; heirs at law at his own death. If so, it would be a vested interest in the persons answering that description at his own death."

The case of *Driver v. Frank*, (a) determined in 1814, affords a strong recent authority for the acknowledged predominance of intention, when sufficiently expressed, over the legal presumption in favour of vesting. The Judges of the Court of King's Bench, though differing as to the application of the principle, yet all concur in admitting its existence, and their reasoning is entirely built upon it. That was a devise of real estates to *Bacon Franks* for life, and after his death to his second, third, and fourth sons in tail: at the death of the testatrix there was no son of *B. F.* in existence; four were afterwards born; two of whom were *in esse* together; the elder of these two died during the existence of the particular estate. The tenant for life died, at which time there was no second son, the second having become an eldest. It was determined by a majority of the Judges, Lord *Ellenborough*, Chief Justice, dissenting, that the remainder vested in him, when second and younger son, and did not afterwards divest. The reasoning, however, of the three Judges who held it a vested remainder, proceeds entirely upon the intention of the testatrix. They all rest their decision upon the ground, that the intention to suspend vesting

(a) 5 *Mau. & Sel.* 25., affirmed on appeal. 6 *Price*, 41. 2 *B. Moor*, 519.

till the determination of the particular estate, was not sufficiently expressed or implied: all agreeing that if such intention had been sufficiently expressed, it would have controlled the legal presumption in favour of vesting.

1820.
 Marquis
 CHOLMON-
 DELEY
 v.
 Lord
 CLINTON.

In a still more recent case, *Doe d. King v. Frost*, (a) the same court decided in favour of intention, against the legal presumption in favour of vesting, making on that ground the term "heirs" refer not to the time of the death of the testator, but to a future contingency.

These authorities appear to me to remove the main difficulty in the present case, as they relieve the Court from the necessity, which was contended to be imposed on it, of adopting implicitly, in the construction of the limitation in question, the technical meaning and legal operation of the words, without being at liberty to examine into the real intention and meaning of the party using them. They clearly prove, that the question is open to that examination, and may be determined by it. They shew that a measure and limit is set to the rule in favor of technical import and meaning. It is not an absolute universal and conclusive rule, but subject in all cases to be controlled by intention when that sufficiently appears. The question then in the present case is reduced to this single point. Legal inference and presumption is admitted to be in favour of the construction contended for by the Plaintiffs; and that presumption must prevail, unless it can be rebutted by clear and sufficient proof of a contrary intention. Does that proof exist in this case? I am clearly of opinion, that it does. Before entering into a statement of the reasons, which have induced me to come

(a) 3 Barn. & Ald. 546.

1890.

Marquis
CHOLMON-
DELEY
v.
Lord
CLINTON.

to this conclusion, and which it will only be necessary to do very briefly, as they have been already in a great measure anticipated, it will be proper to premise, that in order to overcome the presumption in favour of technical meaning, and control the legal operation of the words of an instrument, it is not necessary that a contrary intention, to use the words in a different sense, should be declared in express words. It is necessary that it should manifestly and plainly appear, but that it may from the other parts of the instrument, and from all the circumstances of the case, as satisfactorily as if declared in express terms. An intention may be implied as well as expressed, if the implication be attended with the same certainty. The reasoning of all the Judges in all the cases referred to, has proceeded on this principle. In none was there a direct expression of intention; but the argument for and against the intention rests in every case upon an examination of the circumstances, and the consequences following upon either of the interpretations proposed.

In respect to the general intent and purpose, no case has ever existed, and it is difficult to conceive any to exist, which affords more explicit, certain, and authoritative information than the present, because it is given in a minute and unusual detail by the grantor himself on the face of the deed, in which is disclosed not only what was about to be done, but the reasons why the deed was made, the circumstances that occasioned it, the object which it was to effectuate, and the mode in which that object was to be attained. And on this part of the case, the explicit opinion given by the late Master of the Rolls, (in which I entirely concur) makes it unnecessary to dwell. "That Lord Orford (he observes) had the intention which is ascribed to him," (that is, an intention so to settle the estate as to carry

it to his relations on his mother's side, in default of issue of his own body,) "there can I think be no reasonable doubt." He refers to the preamble, in which this intention is clearly manifested. It is, therefore, not a case of conjectural intention, not in suspense or doubt, but of declaration plain, clear, and certain. Thus far we proceed on sure and safe ground, in which all are agreed. Still, however, a distinction is taken between the intention, with which the deed was made, and the meaning of the words contained in it. And to this the inquiry must now be confined.

1690.
Marquis
CHOLMON-
DELEY
v.
Lord
CLINTON.

It has been shewn, that the limitation presents for examination, two interpretations of the description contained in it, neither the words themselves, nor any rule of law necessarily deciding the question in favor of either. It has also been shewn, that in such a case, legal inference, though entitled to great weight, is not the sole criterion to govern the construction. That the intention and meaning may and ought to be primarily consulted; and if sufficiently manifested, must have the preference. This being the principle, there is, I conceive, little difficulty in the application of it. Examined by this test, it will, I think, clearly appear, both negatively what was not the meaning of Lord *Orford*, and affirmatively what was. The case affords abundantly sufficient evidence to shew, 1st, that Lord *Orford* did *not* mean by the terms made use of in this limitation to give the remainder to the person answering the description of right heir of Samuel *Rolle*, at the time when the remainder was created; and 2dly, that he did mean to give it to the person who should answer that description at the time and in the event, when, if at all, the remainder was to take effect, that is, after his own death and failure of issue. The first point is so clearly demonstrated by

1820.

Marquis
CHOLMON-
DELEY
v.
Lord
CLINTON.

the other parts of the deed, and the circumstances of the case, that the contrary has never been attempted to be argued. It affords an unanswerable negative to such an intention, that the person answering that description was Lord *Orford*, the grantor himself. Now, to suppose, that Lord *Orford* meant to give the remainder to himself by this limitation, is, when the circumstances attending the framing of it are considered, an argument of which it is not too much to say of it, that it amounts to a *reductio ad absurdum*. It would suppose Lord *Orford* to have entertained, at the same moment, intentions on the same points, directly opposite to and incompatible with each other; to provide in the same event for a course of succession, directly the opposite to that which he declared himself desirous to effectuate,

The argument in favour of that construction, has therefore never been put on this ground; it has rested entirely on the peremptory and irresistible effect of legal inference, laying aside all consideration of this characteristic and decisive feature of the case; viz. the circumstance of the grantor's being, and knowing himself to be, the sole heir of *Samuel Rolle* at the time of the grant. The general construction of such a limitation is avowedly adopted, just as if no such circumstance had existed. It is even insisted, that such circumstance ought not to have any effect on the construction. "Supposing, (it is said) we were to read this limitation, without knowing who the person was that answered the description, no doubt could possibly be raised upon its construction. All would agree that the then existing right heir would take a vested remainder; and it would be impossible to contend, that this was a contingent remainder to such person as should at some future period answer the description. When it is found that Lord *Orford* is himself the present right heir,

heir, do the words therefore change their meaning? No: but they are unskilfully employed, and with the meaning that properly belongs to them, they will not effectuate the purpose which the framer of the instrument had in his contemplation." (a)

1820.
Marquis
CHOLMON-
DELEY
v.
Lord
CLINTON.

This passage shews the ground, on which the argument for the construction in favour of the present right heir is placed. It is an entire and implicit reliance on legal inference, without allowing the circumstances of the case to have any weight. True it is, if we read the limitation separately by itself, without knowing who was the then right heir, or any reference to the circumstances, such will be the construction; but will there be the same universal admission of that construction, if it is known who was the then present right heir; and if the other parts of the deed, and all the circumstances of the case are considered? Legal inference is here put on the same footing, as an express and unequivocal declaration. As applied to such a case, no alteration in the meaning could be produced, by a knowledge of the person by whom the declaration was made. But does the same observation apply when the imported meaning is not the result of the words themselves, but of superadded inference? The additional idea suggested by inference originates not with the writer but his expositor; and being collected extrinsically by conjecture, may by extrinsic circumstances be rebutted. Take a familiar instance in the construction of the words "the true religion:" the expositor interprets it to mean the Christian religion; but would he persevere in that construction, when he discovered the words to have come from a Mahomedan? Do the words change their meaning, when that circumstance is discovered? No:

1820.

Marquis
CHOLMON-
DELEY
v.
Lord
CLINTON.

but the erroneous inference of the expositor does,—and so it is in the present case. The donor could not intend to identify his donee, by a character which he knew to apply at that time exclusively to himself. The same character must at a future time; viz. after the death and failure of issue of the grantor, belong to some other person, and that is the time to which the limitation refers. It does so expressly as to the transfer of the estate. It does so in this case by necessary implication as to the person. The time of reference is not expressed, but it is supplied by the context. If a person holding for his life a public character, which on his death would be held by some other person, the Bishop of London, for instance, were to make a grant by deed, of land purchased by him for the purpose of being annexed to his see, to the use of himself for life, remainder to the Bishop of London. Could there be any doubt of the meaning being to grant the remainder, not to himself, but to the person who would, after his death, answer the description of this same character? Suppose Lord *Orford*, in the same deed of 1781, had given directions for his funeral, and had ordered that it should be attended by the right heir of *Samuel Rolle*, would not its being the language of the existing right heir, and relating to what was to be done after his death, have supplied by implication the proper epithet expressive of the real meaning? The description made by the present limitation, relates entirely to a future indefinite period and event. The reservation to the grantor himself of the immediate uses, was the object of the prior limitations. In this the whole subject, laying aside legal inference, (which must not be mixed, as it has been with the present subject; viz. the meaning of the words themselves, independent of and before the application of legal inference,) has a prospective and future aspect. The epithet denoting the time of refer-
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ence of the description, naturally results from the subject matter of the context, coupled with the other circumstances of the case.

1820.
 Marquis
 CHOLMON-
 DELEY
 v.
 Lord
 CLINTON.

One part of the deed is pointed out by the late Master of the Rolls, as tending strongly to negative that construction; viz. the use of the same terms in the recital of the deed, where it is evident that they could not be so interpreted. In the witnessing part, the words are, "for and in consideration of the natural love and affection which the said *George Earl of Orford* had and bore unto his relations, *the heirs of the said Samuel Rolle*." The words "*heirs of Samuel Rolle*" are here used synonymously, with "relations," and could not have meant *Lord Orford* himself; for he cannot be supposed to have been declaring as a consideration for the deed, a natural love and affection for himself. It must have meant, in this place, some person or persons other than *Lord Orford* himself; and it is probable, as the late Master of the Rolls observes, that *Lord Orford* used the words "*heirs of Samuel Rolle*" in one part of the deed in the same sense, in which it is manifest he used them in another. I concur in this observation, though not in the further inference drawn from it. The Master of the Rolls supposed *Lord Orford* to have had in view in both places, and to have meant to designate by these words, some existing person other than himself, and not future unascertained persons, who could not have been the objects of his natural love and affection. I cannot draw the same conclusion. The terms "natural love and affection" here used do not, I think, necessarily import personal knowledge or regard for any particular individual, (who, if the intended object of grant, would probably have been specifically pointed out by name, and not left to be discovered without any clue to identify him,) but are the common formula applied to the consideration


1820.

Marquis
CHOLMON-
DELEY
v.
Lord
CLINTON.

consideration of blood, and inducing the consequent presumption of natural (not acquired) love and affection. This is continued permanently throughout the whole line of descendants, who must consist of future unascertained persons. The gift is expressly to the heirs of *Samuel Rolle* for ever. *Lord Orford's* attachment was not personal to any individual member of the family. The principle which dictated the preference, *quoad* the estates in question, extended to them all; "to the whole family and blood of his late mother, *Margaret Countess of Orford*, on the side or part of her father the said *Samuel Rolle*. The description by character only, and not by name, is the only description that could have been given, if the future unascertained right heir was the person intended to be referred to; but it is not the natural way in which *Lord Orford* would have designated himself, nor is it the way in which *Lord Orford* describes himself in each of the preceding and subsequent limitations, intended to apply to himself, wherein, without any circumlocution or periphrasis, he is mentioned by his proper name and title, "*George Earl of Orford*." Why should there have been this change in the description, if the same person were throughout intended? Why should a less degree of particularity and certainty have been observed in limitations, where, from their being followed with immediate execution, there was less danger of ambiguity or mistake, than in one where the danger was greater, from the possibility of its effect being postponed to a remote futurity? Again, how are we, on this hypothesis, to account for the powers of appointment and revocation specially reserved to *Lord Orford*, in the limitations preceding and following the limitation in question?

Though it has not been argued that *Lord Orford* could have *designedly* used the term "right heir" in this

limitation in the technical sense, meaning thereby to designate himself, yet it has been suggested that he might have so done inadvertently, and under some mistake. Three conjectures have been thrown out to account for this:— 1st, That he might have supposed, that a remainder vests in the persons, who answer the description at the time when the preceding limitation expires: 2dly, That he might have overlooked the circumstance of being himself the right heir of *Samuel Rolle*: and 3dly, That he might have conceived, that the grantor could not himself be considered as the object of his own grant, and that the words would therefore designate such persons as would, if Lord *Orford* were out of the question, answer the description of right heirs of *Samuel Rolle*.

1820.

 Marquis
 CHOLMON-
 DELEY
 v.
 Lord
 CLINTON.

It does not appear to me, that the Court would be warranted in adopting any of these conjectures, nor that any of them will account for Lord *Orford's* using the words in the sense supposed. The difficulty is rather increased than removed by them. They proceed upon the ground of imputing to Lord *Orford* a double mistake: first, in the mistaken use of the term; and, secondly, in being led into that mistake by the commission of a prior mistake. There is no evidence to shew that he committed either mistake.

The first conjecture, instead of accounting for Lord *Orford's* using the term "right heir" to describe himself, would rather tend to establish the contrary conclusion. For if he adverted to the legal doctrine concerning the vesting of a remainder, and meant that the remainder should vest in the persons, who answered the description at the time when the preceding limitations expired, he must have known that the only way of effectuating that intention was by settling the remainder accordingly, and making it a contingent remainder to the person answer-
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1820.

Marquis
CHOLMON-
DELEY

v.
Lord
CLINTON.

ing the description at that time, and not a vested remainder in the person answering the description at the time when the deed was executed.

The second conjecture assumes, without any proof in support of it, a fact in itself in the highest degree improbable, and which is expressly contradicted by the recital of the deed. To suppose that Lord *Orford* should at any time have overlooked the circumstance of being himself the right heir of *Samuel Rolle*, his maternal grandfather, the heirship formed by only two links in the pedigree, and one individual only in each, Lord *Orford* the only child of his mother, and she the only child of *Samuel Rolle*, would have been highly improbable; to suppose him to overlook this at the time and under the circumstances of this deed, when the circumstance of the heirship of *Samuel Rolle* formed the principal subject of his anxious attention, and the main reason for making the deed, would be still more improbable; but to entertain or act upon such a conjecture, in the teeth of the recital of the deed, in which the connection by heirship with *Samuel Rolle* is the permanent and leading feature, expressly and repeatedly stated by the grantor himself, as the ground and foundation upon which the whole settlement was made, and that for the purpose of defeating and destroying the settlement, would be totally unwarrantable.

As to the third conjecture, if Lord *Orford* entertained the conception imputed to him, why should he not have acted upon it, by an express and unequivocal designation of the person who was the object of his bounty, rather than purposely misleading the construction by a designation of himself, which he is supposed to have known and intended to have been of no avail, and which could, therefore, only tend to present an apparent
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obstacle in the way of his intention, without any clue being afforded to explain or unravel the mystery?

There remains still to be noticed, one ground of argument under the head of intention. To overcome the technical meaning, which legal inference annexes *prima facie* to the words "right heirs of Samuel Rolle," it is contended not to be sufficient, to shew a negative intention not to use the words in that sense. The *onus probandi* lies on the party resisting the meaning of legal inference, to shew affirmatively, by clear and sufficient evidence, some other meaning, in which the words were intended to be used. And this, it is said, both by the Master of the Rolls and three of the Judges, to whom this question was referred, is not done in the present case.

I entirely concur, however, in the opinion of Mr. Justice Bayley, expressed in his certificate, that the meaning of Lord Orford in this limitation is, by sufficient evidence, shewn to have been to grant the remainder, if he should make no appointment, to such person as at the expiration of the estate tail, should be the right heir of Samuel Rolle in fee. First, because without any direct proof of actual meaning, the Court would, I think, upon general principles, be bound to presume this to have been the meaning annexed by Lord Orford to the words which he has used. And, secondly, because the words themselves, coupled with the other parts of the deed, and the circumstances of the case, afford clear and sufficient evidence that such was in fact the actual meaning of Lord Orford in the use of these words.

As to the first ground, the Court having been put into possession of the intention with which the settlement

1820.

Marquis
CHOLMONDELEY
v.
Lord
CLINTON.

1820;
 Marquis
 Cholmon-
 dely
 P.
 Lord
 Clinton,

ment was made, the purpose which it was to effectuate, and the description of person to whom, in the event in question, the estate was to be carried by it, and this by the declaration of the grantor himself, recorded on the face of the deed, so as to leave no reasonable doubt on the subject, and being called upon to expound a set of words, admitting equally of two interpretations; one of which, though conformable to what would be the *prima facie* technical meaning, yet, if adopted, would in this case have the effect of defeating the intention, disappointing the purpose, and transferring the estate from the person intended to be the grantee, to the very person intended to be excluded: the other, on the contrary, in every respect fulfilling and carrying into execution the declared object and purpose, in exact accordance with the recorded intention of the grantor, the Court, I say, is in such a case bound by all the principles and authorities that have been referred to, affording the rule of construction both of deeds and wills, to presume in favour of the latter meaning, and reject the former. By the same principles, the Court is bound to form the same conclusion, from the effect which one interpretation has to render the deed nonsensical, inoperative, and void; the other to reconcile all the parts of it, and make them consistent and productive of their proper effect. — *Ut res magis valeat quam pereat.*

Under the second head, when one of the two meanings, of which the words are capable, has been completely negatived, and proved to be such as the grantor could not have entertained, it follows as a necessary consequence, that he must have entertained the other, unless, what is not to be supposed, the grantor used the words without any meaning at all. Of the two right heirs, the present and the future, either

either might have been the object of his grant in this limitation, if it be clearly proved that he did not mean the former, it necessarily follows that he must have meant the latter.

1820.
 {
 Marquis
 CHOLMON-
 DELEY
 v.
 Lord
 CLINTON.

There is besides positive and direct evidence that this was his meaning. It is said "that it is only because this would have been the most proper limitation to effect the grantor's object, that we are desired to say, it is the limitation, which he has actually made." Is not this a very sufficient reason for coming to this conclusion? As applied to express words that have a fixed and determinate meaning, no argument can be derived, from the consequences they produce, to change or affect their meaning; but it is not so where, as in this case, the words are doubtful and equivocal, where the sense is imperfect, where the sentence will admit of two interpretations: there the consequences which will ensue from either interpretation are properly considered to be a right criterion of the real meaning of the party. What better way can we have of ascertaining what was the actual meaning? Why are we to suppose the party to have preferred the meaning that would defeat his intention, destroy his deed, and carry the estate to a wrong person, to the one which will produce the contrary effect? The reasoning of Mr. Justice *Lawrence*, when assisting the Chancellor in *Leigh v. Leigh (a)*, proceeds upon this principle. He says, that "in endeavouring to ascertain the meaning of a testator, the absurdities, improbabilities, and inconsistencies which may arise out of cases, falling within one construction or another, have constantly been attended to, with a view of ascertaining such meaning." And after stating that the testator could only have had one of two objects, he

(a) 15 Ves. 105.

1820.

Marquis
CROLMON-
DELEY
v.
Lord
CLINTON.

adds, "that in order to ascertain whether the first of these two objects was that which the testator had in his view, the situation and circumstances of his family at the time of making his will, have great weight."

If we have recourse to the same mode of reasoning in the present case; if, laying aside technical and artificial reasoning, we apply our minds to the unfettered consideration of every other test, by which the real meaning and intention of Lord *Orford*, in the limitation in question, can be ascertained, we shall be at no loss to discover, what was the period to which he meant the description of the right heir of *Samuel Rolle* to be referred. There is no balance or opposition of testimony on this point. The whole plan and object of the settlement, as detailed in the recital, from the beginning to the end, the correspondence, order, and connection of all the parts of it, the purpose which it was to effectuate, the mode in which that purpose was to be effectuated, the nature of the limitation in question, the period of time and event to which it throughout solely relates, the terms in which the person is described, the object which the grantor had in view in the description, and the requisites which, according to that object, were made necessary to give a title under it, all concur in the same implication; all tend to negative the inference, by which the epithet denoting a reference to the present time is added to the term "right heir," and demonstrate the contrary inference, by which the epithet denoting a reference to the future time is to be inserted.

A doubt has been attempted to be raised respecting the precise period and event, to which, on the execution
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of the deed; the remainder to the right heir of *Samuel Rolle* was to be referred. The proper answer to this objection is, I think, given in the certificate of Mr. Justice *Bayley*. Subject to the power of appointment, the remainder is to the person or persons who should, at the expiration of the estate tail given by the prior limitation to *George Earl of Orford*, answer the description of right heir of *Samuel Rolle*. The remainder, being subject to the power of appointment, creates a degree of uncertainty respecting it. But I have not thought it necessary to enter into the question raised at the bar, whether on that account the remainder could be deemed a contingent one. I have proceeded on the assumption, that the later authorities have set that question at rest. The existence, however, of the power of appointment, ought not to furnish an argument on the other side, the remainder being upon another ground contingent; viz. from its being given to a person, who is not ascertained at the time when the remainder is created, but who will be, at the time when the particular estate is determined. The collateral maternal line of *Rolle* is to commence, when the direct line ends by the death and failure of issue of *George Earl of Orford*. At that time and event, the remainder is to vest in possession, in the person who is then the right heir of *Samuel Rolle*, but subject to the power of appointment, reserved by the prior limitation to the grantor the Earl of *Orford*.

1820.

Marquis
CHOLMON-
DELEY
v.
Lord
CLINTON.

The question whether a power of appointment suspends the vesting of remainders subsequently limited, set at rest by the later authorities.

This is the opinion, which after long and repeated consideration, I have formed upon this question, and which, for the reasons before given, I have not thought it right to withhold. I have explained the grounds of it, with, I fear, too much of prolixity and repetition, but from an anxiety that they may be examined, if it should

1820.
 Marquis
 CHOLMON-
 DELLY
 v.
 Lord
 CLINTON.

be wished, by a higher and better tribunal. The question, however, which is purely legal, is not now to be determined by this opinion. The single point made by the Defendants, in respect to this part of the case is, that the legal title ought not to be considered as finally and conclusively determined by the opinions which have hitherto been pronounced upon it; that it ought to be again submitted to the consideration of a court of law. With my impressions on the subject, and considering the magnitude and importance of the question, and the difference of opinion that has prevailed respecting it amongst the learned judges of the court of law to which it was referred, I think a sufficient ground has been laid to call for that second reference. But before that is decided, it will be necessary to enter into the consideration of the other parts of the case.

The questions which remain in the cause, will require a separate and distinct consideration. In the examination of them, I shall assume, for the sake of argument, the question already discussed, on the construction of the deed of 1781, to be in favour of the Plaintiffs; and that on the death of *George Earl of Orford*, the title passed by descent to his uncle and heir, *Horace*, the preceding Earl. The objections which have been taken on the part of the Defendants, may be reduced to four heads. 1st, As to the want of proper parties as Defendants to the suit; 2dly, As to the frame and nature of the bill and the relief prayed; 3dly, As to the effect of the deed of confirmation of 1794; and 4thly, As to the question, one of the greatest magnitude and importance, of the effect of the length of time, and of the acquiescence and non-claim, that has occurred in this case.

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[The Master of the Rolls then stated the names of the parties, Plaintiffs, and Defendants, and all the pleadings in the cause, which, with some few variations, are contained in the report of Mr. *Merivale*.] He then upon the first point proceeded to observe, that it was contended on the part of the Defendants, that all the persons eventually interested in the estate under the settlement, made by the late Lord *Clinton*, in the year 1792, ought to have been made Defendants. That by the terms of that settlement, the estate, after being settled on the present Lord *Clinton* for life, remainder to his sons and daughters in strict settlement, (none of whom have as yet been born,) remainder to the heirs of the body of Lord *Clinton*, is limited over to his brothers and sisters, and others, all of whom should, it is insisted, have been parties to the suit. I think this objection is not well founded. It is sufficient to have brought before the Court the trustees of the person *in esse* entitled to the first vested estate of inheritance. Those who have contingent interests are not necessary parties. Lord *Hardwicke*, in *Hopkins v. Hopkins*, states the established rule on this point. "If (says he) there are ever so many contingent limitations of a trust, it is an established rule, that it is sufficient to bring the trustees before the Court, together with him in whom the first remainder of the inheritance is vested, and all that may come after will be bound by the decree, though not *in esse*, unless there be fraud and collusion between the trustees and the first person in whom a remainder of inheritance is vested." (a)

1820.
 Marquis
 CHOLMON-
 DELEY
 v.
 Lord
 CLINTON.

But the next objection on this head, as to another person who, it is insisted, ought to have been a party, is, I think, better founded. I mean the person entitled to the estate in the county of *Dorset*, which belonged to *George*

(a) 1 Atk 590.

1820.

Marquis
CHOLMON-
DELEY
v.
Lord
CLINTON.

Earl of *Orford*, and formed part of the estates comprised in the original mortgage, together with the estates in the counties of *Devon* and *Cornwall*, and still forms a part of the estates comprised in the mortgage, sought to be redeemed by this bill. This bill is confined to the estates of *Devon* and *Cornwall*, they having been alone for the reasons before given, included in the deed of 1781. But the estates in all the three counties are equally subject to, and comprehended in one and the same mortgage, and must therefore all be redeemed together. The owner of part of the estate in mortgage cannot separately redeem his part. The mortgagee is entitled to insist, that the whole of the mortgaged estate shall be redeemed together; and for this purpose, that all the persons interested in the several parts of the estate as mortgagors, should be made parties to the bill seeking the account and the redemption. A mortgaged estate sold in twenty lots might otherwise be made the subject of twenty different bills for redemption; with all the consequences upon the account and the reconveyance. The same objection prevailed in this same subject, in the case of *Palk v. Lord Clinton (a)*, with the difference only of its being a bill by a second mortgagee, to redeem the first, when the late Master of the Rolls stated fully his reasons for deciding, that the cause could not proceed without the owner of the *Dorset* estate being made a party. I think the same in the present case.

The bill is also defective in not having made the personal representative of the late Lord *Clinton* a party, who is stated in the bill to have been some time in possession of the rents and profits, and to have paid the interest and part of the principal of the first mortgage. His representative, therefore, is a necessary

(a) 12 Ves. 48.

party to the account to be taken of what is due upon the mortgage. The bill anticipates this objection, and states as an answer to it, that the personal representative could not be found. That is negatived by the answer. Mr. *Cleveland* is shewn to have been the executor of the late Lord *Clinton*, and to be still living, and his residence is mentioned.

1820.

Marquis
CHOLMON-
DELEY
v.
Lord
CLINTON.

The second head contains an objection of an opposite nature, that a party is made a co-plaintiff, who ought not to have been. I cannot say that I am satisfied this bill is properly framed, with a view to its professed object. It should have been, I think, a bill by Mrs. *Damer* alone, the devisee of *Horace Earl of Orford*, praying separately to be allowed to redeem. The Marquis of *Cholmondeley* should not have been a co-plaintiff, but a defendant, if a party at all. I cannot understand how, as this case is circumstanced, the Marquis can properly have been united in interest with Mrs. *Damer*, and a joint redemption prayed, a joint account, and a reconveyance and delivery of possession to both the Plaintiffs. The ground on which the bill proceeds in requiring the joint relief, is the agreement stated to have been made between the two Plaintiffs. The bill, after stating the death of *Horace Earl of Orford*, his will and codicil, and the person who was his heir at law, cautiously abstains from any averment that the title to the estates in question passed, either by the will and codicil to Mrs. *Damer*, or by descent to the Marquis of *Cholmondeley*. It could not be as the bill states, that upon the death of *Horace Earl of Orford*, "*your orator and oratrix became entitled to the same.*" One or other might become entitled, but claiming under opposite and contradictory titles, the one as devisee, the other as heir of law, they could not be both entitled. The bill states, that some questions had arisen between

Whether a devisee and heir-at-law can join in a bill claiming an equity of redemption, upon the allegation, that questions having arisen as to which of them was entitled to it, they had agreed to divide it between them.
Q^a.

1829.

Marquis
CHOLMON-
DELEY
v.
Lord
CLINTON.

the Plaintiffs respecting the will and codicil of *Horace Earl of Oxford*, as far as regarded the equity of redemption of the said mortgaged estates; and that in order to put an end to such questions, they had agreed to share the same between them. The Court is called upon to act on this agreement, by giving the joint relief. But the difficulty is how the Court can do this, without having the agreement before them proved to have existed in point of fact, and without being satisfied by an examination of the terms and nature of the agreement, that it was one which the Court ought to carry into execution. There is no evidence in the cause to prove the fact; the agreement itself is not produced, nor the terms stated, and the legality of it, as far as it is stated, seems to be very questionable. The statute of Henry 8. prohibited and rendered penal any contract for an estate, of which neither of the parties had been in possession for the space of one year before the contract, and the agreement in the present instance proposes, with a view to assist a title by litigation, to divide the estate of a third person, (to make the *campi partitio*) of which that person had been for more than twenty years in the sole and exclusive possession, without any participation or claim by either of the parties to the agreement. I think a court of equity ought not blindfold to assume the existence and legality of such a contract. If proved and produced, it might be necessary to call for the decision of a court of law on its legality. But in the absence of any means of information, either as to the fact or the law, the Court must, I think, consider the case as if no agreement had been made. In what way then is the Court to decide between co-plaintiffs, possessing opposite and contradictory claims to the title, each asserting a claim, and neither admitting the validity of the claim of the other? Can two co-plaintiffs be put to interplead? How is the Court to know what

what was the nature of the questions, which are said to have arisen respecting the will and codicil? How can the Court decide them in this cause? and yet till they are decided, how is the Court to know whether the title is to be examined upon the principles, applying to the claim of an heir at law, (which it is insisted may be made at any time within the period of sixty years) or of a devisee, confined to twenty years? If the account and redemption, conveyance and possession, are to be decreed separately to Mrs. *Damer*, as the Marquis of *Cholmondeley* does not admit her separate title, it must be upon a previous decision in favour of that separate title, without the heir at law being heard or having any opportunity to bring forward his objections to it. The converse of this objection would hold to any decree in favour of the Marquis of *Cholmondeley*. How is then the Court to proceed in a bill, which is so framed, that it cannot give either joint relief to both the complainants, or separate relief to either.

1820.
Marquis
CHOLMON-
DELEY
v.
Lord
CLINTON.

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As to the third head of objection, the effect of the deed of confirmation of 1794, two questions are made, 1st, Whether, supposing the title of the late Lord *Clinton* not to have been good before that deed was executed, it was made good by it: and secondly, whether if it did not operate as a confirmation of the title of Lord *Clinton* for every purpose, yet whether it was not *se pro tanto*, to the extent of being a protection in a court of equity, to the sums of money which were advanced in mortgage, upon the faith of it. Both these appear to me questions deserving of great weight and consideration, but I shall not give any opinion respecting either of them. They will, I think, be better considered hereafter, when the case comes back from a court of law, if it should be sent there upon the first point.

I shall

1820.

Marquis
CHOLMON-
DELEY
v.
Lord
CLINTON.

I shall only observe upon the second of these questions, that though Sir *L. Park* has not, in his answer, expressly stated his having seen the deed of confirmation, when he advanced his money, yet it does not appear to me to follow, that, if that should be found to be a material point to be established, there is not enough stated in the answer to warrant a farther enquiry respecting it.

I have not thought it necessary to dwell much upon any of these minor questions, because I have persuaded myself, that the final decision of the case can never depend upon them, and because it is of great consequence that it should not. The great question in the cause, which is the subject of the fourth and last objection, the effect of time and nonclaim, compared with which every other question, however in itself important, sinks into insignificance, calls for a separate, immediate, and unequivocal determination. One of greater importance hardly ever arose in any cause. It is one upon which the title to every estate in the kingdom does or may depend. The decision of such a question cannot be suspended without the greatest inconvenience and mischief to the public. The determination, which has been pronounced on this point, with the highest deference for the great and able Judge, by whom it was pronounced, appears to me, after the fullest attention bestowed on all the reasons and cases adduced in support of it, to call in question principles, which I have always considered to have been long and clearly settled by the uniform concurrence of the highest authorities, and to have become the established law of the Court. The question appears to me, in its necessary result, to amount to this general question, whether, in respect to the bar arising from length of time, the analogy between legal and equitable estates is any longer to exist,—whether the rule is to be

considered as any longer in force which is laid down by Lord *Redesdale* in *Bond and Hopkins* (a), and is to be found in almost every other case, that if the "equitable title be not sued upon within the time, within which a legal title of the same nature ought to be sued upon, to prevent the bar created by the statute: the court, acting by analogy to the statute, will not relieve. If the party be guilty of such laches in prosecuting his equitable title, as would bar him, if his title were solely at law, he shall be barred in equity."

1820.

 Marquis
 CHOLMON-
 DELEY
 v.
 LORD
 CLINTON.

Now, that in this case the claim would have been barred by the statute of limitations, if it had been the case of a legal, and not an equitable estate, is not disputed. Mrs. *Damer*, the devisee, is on all sides admitted to be the only person, who could have had any claim of title under *Horace* Earl of *Orford* to this estate; and the full period of twenty years having elapsed since the death of *George* Earl of *Orford*, when that title, if at all, first accrued, the remedy would have been taken away by the statute in consequence of the laches and non-claim. The lapse of twenty years affords a substantive insuperable plea in bar. It is the fixed limit to the remedy—the *tempus constitutum*. One day beyond is as much too late as one hundred years. This is the peremptory inflexible rule at law, fixed by positive statutes, if there has been adverse possession, and no disability or fraud. No plea of poverty, ignorance, or mistake can be of any avail. However clear and indisputable the title, if the merits could be inquired into, however demonstratively tortious and wrongful the adverse possession, the fact of such possession, and the time, preclude all investigation of the title. The door of justice is closed. The claimant cannot be heard

(a) 1 Sch. & Lef. 429.

1820.

Marquis
CHOLMON-
DELEY
v.
Lord
CLINTON.

to shew his title. It is a decisive answer to him that he comes too late. That alone is the bar. His title remains, but he has lost his remedy. The statute is founded upon the wisest policy, and is consonant to the municipal law of every country. It stands upon the general principle of public utility. *Interest reipublicæ ut sit finis litium*, is a favorite and universal maxim. The public have a great interest, in having a known limit fixed by law to litigation, for the quiet of the community, and that there may be a certain fixed period, after which the possessor may know that his title and right cannot be called in question. It is better that the negligent owner, who has omitted to assert his right within the prescribed period, should lose his right, than that an opening should be given to interminable litigation, exposing parties to be harassed by stale demands, after the witnesses of the facts are dead, and the evidence of the title lost. The individual hardship will, upon the whole, be less, by withholding from one who has slept upon his right, and never yet possessed it, than to take away from the other what he has long been allowed to consider as his own, and on the faith of which, the plans in life, habits and expences of himself and his family may have been (as it is alleged in the present instance they were), unalterably formed and established.—*Vigilantibus et non dormientibus lex succurrit.*

Upon this principle the law of *Athens* prohibited in general all actions, where the injury had been committed six years before the complaint was made. And the Roman law (a), which is termed "*saluberrima lex*," fixed a period, after which it was declared the party "*hinc saluberrimæ nostræ sanctioni succumbit, et quadraginta annorum curricula sopiatur*;" and by another law,

(a) *Codex*, lib. 7. tit. 39.

the period of thirty years was fixed as the utmost limit for personal actions.

In this country the principle has been strongly enforced and acted upon in the earliest times. It is mentioned by *Bracton*, in his 2d Book, ch. 22.; the title of which is *Qualiter acquiritur possessio per usucaptionem*, which he explains to be *sine titulo et traditione per longam continuam et pacificam possessionem ex diuturno tempore*, and in another place, *per longam et pacificam seisinam, habitam per patientiam et negligentiam veri domini*. "*Ita erit (he says) modus acquirendæ possessionis: longa enim possessio, sicut jus, parit jus possidendi, et tollit actionem vero domino petenti, quandoque unam, quandoque aliam, quandoque omnem, quia omnes actiones in mundo infra certa tempora habent limitationem.*" *Plowden* (a) states several instances of the care taken by the ancient law to limit a time for the public repose of the realm, and in order to put a stop to contention, and avoid universal trouble to the subjects of the realm.

In the courts of equity of this country the principle has been always, as I shall hereafter shew, strongly enforced. They have refused relief to stale demands, even in cases where no statutable limitation existed, and whenever any statute has fixed the period of limitation, by which the claim, if it had been made in a court of law, would have been barred, the claim has been by analogy confined to the same period in a court of equity. If this principle be applied to the present case, the decision can admit of no doubt. The time has indisputably elapsed. *George Earl of Orford* died on the 5th December 1791, and the present bill was not filed till the 12th June 1812.

1820.
 Marquis
 CHOLMON-
 DELLY
 v.
 Lord
 CLINTON.

(a) Page 357.

1820.

Marquis
CHOLMON-
DELEY
v.
Lord
CLINTON.

The time having begun to run against *Horace Earl of Orford*, must continue to run on against those claiming under him. There is no pretence of any disability; mistake cannot be allowed to operate against the bar; if it could, the bar itself would in all cases be got rid of: the possession has been during the whole period completely and unequivocally adverse; there can hardly exist a case in which this point could be more clearly proved. It is strongly stated on the face of the bill, in the narrative of the transactions passing during the interval between the period when the title is stated to have accrued, viz. the death of *George Earl of Orford*, and the assertion of it in the present suit. The fact of the possession immediately taken by the late Lord *Clinton*, upon a claim of title under the deed of 1781, the exercise of every act of ownership and dominion by the late and present Lord *Clinton*, the receipt of the rents and profits, the payment of the outgoings, the interest of the old mortgage, the new settlements made of the estate by the late Lord *Clinton* in the next year after the death of *George Earl of Orford*, creating long terms of years for a jointure and raising portions, and for borrowing large sums upon new mortgages, and settling the estate permanently in his family; all this the bill states to have been made known to *Horace Earl of Orford*; that he was acquainted with the ground upon which Lord *Clinton* founded his title, and that he took legal advice upon it, and in consequence acquiesced in Lord *Clinton's* supposed valid title, both upon the death of *George Earl of Orford*, and three years afterwards, when he deliberately, after again consulting his legal advisers, executed the deed of confirmation of 1794, expressly recognizing the title of Lord *Clinton*, and the acts done by him under it, and sanctioning them by that deed. Upon the death of *Horace Earl of Orford*, neither his devisee or heir, though each now set up a claim to the estate,

ever

ever took any step to prosecute the claim till the present suit, when the twenty years had elapsed.

1820.
 Marquis
 CHOLMON-
 DELEY
 v.
 Lord
 CLINTON.

It is true that during the whole of this time the estate has been subject to the mortgage sought to be redeemed by this bill, and the legal estate has been outstanding in the assignees of the term of two hundred years, created by the settlement of *Samuel Rolle* in October 1704, and in the persons entitled to the fee, subject to the above-mentioned term, by way of mortgage under the indenture executed by *George Earl of Orford* in July 1784. The estate in the hands of *George Earl of Orford* was subject to this term and this mortgage, and the interest was regularly paid by him to the mortgagee as it became due. *Lord Clinton*, and after him his son, when they succeeded to the estate remaining subject to the mortgage, continued to pay the interest from time to time, in the same manner as had been done by the preceding owner of the estate, and as every owner of it must have done, so long as the mortgage continued to be an existing incumbrance on the estate. What effect this will have in point of form on the Plaintiff's title to relief in this cause, will be hereafter considered. At present I shall only observe, that it is difficult to discover how in substance it can make any difference in the main points, on which the bar arising from length of time and nonclaim is founded. So long as the incumbrance continues, the interest must be paid by whoever is the owner of the estate, as much as the taxes or any other outgoing. Payment thereof is an admission of the debt, and of the title of the mortgagee, but it is no admission of any right existing in any other person to the estate, much less of the right of any person, alleged to be the rightful mortgagor. It is, on the contrary, in respect to him, in itself the strongest exercise of adverse possession.

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1820.
 Marquis
 Chelmon-
 DELBY
 v.
 Lord
 CLINTON.

It is a public usurpation of the character of mortgagor, from year to year doing the acts which belong to it. If Lord *Clinton* had refused or declined to pay the interest of the mortgage created by the person under whom he claimed, he would thereby have either negatived his own title, or have acted inconsistently with it; and, in this respect have omitted to exercise one of the acts of ownership resulting from it. By paying the interest in his own name, and on his own account, as the owner of the estate, he took upon himself that character. The mortgagee recognized him as such by receiving the interest from him, *Horace Earl of Walpole*, and those who claimed under him, knew this, but never interfered to offer payment themselves, or question its being made by the *Lords Clinton*. They forbore in this respect, as well as every other, to act as the owners of the estate, because they considered that character to belong to the *Lords Clinton*, and not to themselves. They therefore in so doing recognized and acquiesced in his title, but he did nothing to recognize theirs. On the contrary, his acts were uniformly adverse to it. The laches and nonclaim of the one party, and the adverse possession of the other, are as strongly exemplified in this instance as in every other. The former, therefore, cannot be accounted for or excused by it, nor the effect of the other changed or weakened.

If then this case is to be governed by the principle stated by Lord *Redesdale* in *Bond v. Hopkins*, the Court cannot give the plaintiff any relief. Upon what ground then is this bar to relief to be overcome? Is it by denying the existence of such a principle, or the application of it to the present case?

The estate being subject to a mortgage, made prior to the time when the rights claimed by the present parties accrued, as it is from this circumstance (as the late

Master of the Rolls observes) that the question of title comes to be discussed in a court of equity. The Plaintiffs, assuming the equity of redemption to be in them, or one of them, pray by the bill, first, that they may be allowed to redeem the mortgage: and, secondly, that they may obtain from Lord *Clinton* the possession of the estate, and an account (for a certain period at least) of the rents and profits which he has received.

1820.

 Marquis
 CROMMOR-
 DELEY
 v.
 Lord
 CLINTON.

Why should not the bar from length of time apply to such a claim?— Might not *Horace* Earl of *Orford* have preferred the same claim in a court of equity in the year 1791? Might it not have been preferred during any part of the twenty years which have since been suffered to elapse? Why is this to be made an exception to the general rule, and the laches and nonclaim not to be followed with the consequences which the analogy to the statute of limitations prescribes? The only ground for taking the case out of the operation of this principle is, that the estate was subject to a mortgage, secured by an old term, and a mortgage in fee. How does this in reason operate upon the principle? Why should the operation of a most important public statute be defeated, by what can in no respect touch the principles on which it is founded? May not the claim be brought forward to an estate subject to a mortgage as easily and as promptly as to one that is not subject? Would the Plaintiff have been barred, if she had only prayed for possession and account, which is the principal claim; and does she get rid of the bar by adding a prayer for redemption? If twenty years be not the limit to the claim of an estate under mortgage, what is the limit? Is the title to continue open to litigation to any period, however long? What are the reasons and authorities for so novel and alarming a doctrine? After the fullest consideration of the subject, I feel it incumbent on me

1820.

Marquis
CHOLMON-
DELEY
v.
Lord
CLINTON.

to declare that I cannot discover any ground for it. It stands, I think, upon no principle; and is directly contrary to the settled law of the Court, established by the highest authorities.

The course of reasoning pursued in support of this doctrine appears to me to lead, by inevitable consequence, to a denial of the analogy, hitherto universally understood to be long and clearly established, between legal and equitable estates, and particularly in respect to the statute of limitations. There is nothing that peculiarly distinguishes the present case from every other, in which the estate is subject to a mortgage in fee. The circumstances relied upon in argument, are those which must exist in every case of that nature; and, indeed, principally in every case, where the legal estate is outstanding, that is, in every case of an equitable estate. The proposition is therefore general, that the bar arising from length of time never can be set up to protect an estate, when the legal estate is outstanding, that is, whenever it is an equitable estate; in other words, that there is no analogy existing between legal and equitable estates in respect to the statute of limitations. The equitable estate, it is argued, cannot be barred, unless the legal estate be also barred; that is, there is no bar in a court of equity in the case of an equitable estate. The only bar is that which in a court of law operates upon the legal estate.

The reasons given to shew that there is no room in this case, for the operation of the analogy to the statute of limitations, would apply equally to every case, in which the owner is possessed only of the equitable estate, the legal estate being outstanding in a trustee. The legal right to the possession is in the trustee. *Cestui que trust* is, in a court of law, considered as a mere tenant

tenant at will. Disseisin, strictly speaking, can never take place of a mere equitable estate. The equitable owner has not the entire estate, legal and equitable, but only a limited and partial interest. At law his possession may be said to be precarious and permissive, for the law recognizes no right to the possession, except that which is vested in the holder of the legal estate. These are the necessary and inseparable incidents to every equitable estate. No case can ever exist, in which the possession of the equitable owner will not be open to these observations. If then these are deemed sufficient to prevent the possession having the effect of working a bar to relief by length of time, the necessary consequence is, that the bar never can take place, in the case of an estate possessed under an equitable title. The statute of limitations may operate on the legal estate, but if that does not take place, the equitable estate can never be separately protected by any bar from length of possession, whatever may be the duration of it. There is, therefore, an end of the analogy. The equitable estate is not governed by the same principle as the legal.

1820.
 Marquis
 CHOLMON-
 DELEY
 v.
 Lord
 CLINTON.

The whole of this reasoning appears to me to be grounded on the view which is taken of an equitable estate in a court of law, and the rules and principles which are there applied to it; as if it was to be considered in the same point of view, and governed by the same principles in a court of equity. If this reasoning were allowed to prevail, the whole system of law applying to equitable estates, ever since the introduction of uses and trusts, would be overturned. If the absolute owner of the equitable estate were to be considered for every purpose in a court of equity, as he is in a court of law, viz. as a mere tenant at will, how could he be allowed to exercise any acts of owner-

1820.

Marquis
CHOLMON-
DELEY
v.
Lord
CLINTON.

ship over it, to alienate or devise it, or transmit it to his heirs? How could any of the rules of property or of the common or statute law, by which estates of inheritance are governed, apply, upon this principle, to an equitable estate? The harmony and uniformity of the laws of real property would be destroyed, if it was to depend on the estate being legal or equitable; if the legal estate were governed by one set of rules, and the equitable by another. But the mischief of such a discordance has long been obviated. By allowing the analogy to prevail throughout, the same laws apply equally to both. The equitable estate is the estate at law in a court of equity, and is governed by all the same rules in general, as all real property is, by imitation. The equitable estate in this court is the same as the land, and the trustee is considered as a mere instrument of conveyance. "Twenty years ago," (said Lord Mansfield, in *Burgess v. Wheate* (a), "I imbibed this principle. Every thing I have heard, read, or thought of since, has confirmed that principle in my mind." And, after illustrating this doctrine, he concludes with stating that, on clear law and reason, and the great authority of the case of *Casborne v. Scarfe* (to which I shall hereafter have occasion to refer), *cestuy que trust* is actually and absolutely seized of the freehold in consideration of this court, and therefore that the legal consequences of an actual seisin of a freehold shall, in this court, follow for the benefit of one in the post. Lord Hardwicke explains the analogy, and the necessity there was for establishing it, in part of his judgment in *Hopkins v. Hopkins*, which has been cited; that part of it which is relied upon, as tending to negative the analogy in the instance of the statute of limitations, will be hereafter considered. The same doctrine is stated in *Banks v.*

(a) 1 *Eden*, 224.

Sutton (a), to have been laid down by Lord Cowper, and is distinctly recognized and adopted by the Master of the Rolls, in *Phillips v. Bridges*. (b)

1820.

 Marquis
 CHOLMON-
 DELEY
 v.
 Lord
 CLINTON.

If then it be clearly established, that in all other respects this analogy subsists between legal and equitable estates, and that they are in general governed by one and the same system of law, why should there be an exception made of the statute of limitations? Why should *that* be the only public law affecting real property, which should not extend to equitable estates? Does not every principle of public policy equally require the operation of this salutary law, in one species of estates as in the other? Would not all the same benefits result to individuals and to the public, from there being a known and fixed limitation of time, after which no claims should be allowed to be received in the courts of equity, as well as in the courts of law, and would not the same mischief attend an opening being left therein to interminable litigation? Is not the quiet and repose of the community as much concerned in the one as in the other? Can there be any subject in which a uniformity of the rule of property is more called for and necessary? Would not the statute of limitations be otherwise rendered partial, defective, and, in a great measure, inoperative? The reasons for adhering to the analogy are stronger, in the case of the statutes of limitations than in that of any other law; because originally, and in cases not governed by any positive law, courts of equity have always recognized and acted upon the policy on which those statutes are founded, in the refusal to give relief to stale demands, merely upon the ground of non-claim and length of time, though in other respects the demands were entitled to relief, as in the cases of *Bonney v.*

(a) 3 P. W. 713.

(b) 3 Ves. 126.

1820.

Marquis
CHOLMON,
DELEY
v.
Lord
CLINTON.

Ridgard (a), before Lord Kenyon; *Andrew v. Wrigley* (b), before Lord Alvanley; *Hercy v. Dinwoody* (c), before the same Judge. The late *Master of the Rolls*, too, (who, in *Stackhouse v. Barnston* (d), had recognized the analogy, saying, with regard to the statute of limitations, "though it does not apply to equitable demands, yet equity adopts it, or, at least, takes the same limitation in cases that are analogous to those in which it applies at law,") acted upon the general principle in the case of *Gregory v. Gregory*, in the year 1815 (e), where the time was only eighteen years, and the case on the merits favourable for relief, yet it was refused upon the authority of *Bonney v. Ridgard*, in which the *Master of the Rolls* states "Lord Kenyon dismissed the bill merely upon the lapse of time, though he thought it was a transaction in which, if recent, the Court would have granted relief." "There would be no security," (the *Master of the Rolls* observes,) "for men's rights, if it were otherwise. Upon the ground of length of time, therefore, the bill in this case must be dismissed." The same great Judge also, in *Beckford v. Wade* (f), strongly reprobates the introduction of constructive trusts to get rid of the equitable bar from length of time, observing that, "according to every principle upon which statutes of limitation are grounded, long possession ought to secure a party against the necessity of entering into such a controversy at a distance of time. "Courts of equity," (he says,) "by their own rules, independently of any statutes of limitation, give great effect to length of time, and they refer frequently to the statutes of limitation for no other purpose than as furnishing a convenient measure for the length of time that ought to operate as a bar in equity to any particular

(a) 1 *Cox*, 145.(b) 4 *Bro. C. C.* 138.(c) 2 *Ves.* 87.(d) 10 *Ves.* 466.(e) *Cooper's Rep.* 201.(f) 17 *Ves.* 96.

demand."

demand." Lord Camden, in his celebrated judgment in *Smith v. Clay*, states the general principle, and, as is well known, determined in that case that length of time was a bar to a bill of review, though there was manifest error on the face of the record: "I will not," he said, "consent to re-hear a cause which has slept twenty years from the time of the decree," and he dismissed the petition.

1820.
 Marquis
 Cholmon-
 deley
 v.
 Lord
 Clinton.

These cases show, first, that courts of equity have at all times, upon general principles of their own, even where there was no analogous statutable bar, refused relief to stale demands, where the party has slept upon his right, and acquiesced for a great length of time; and, secondly, that whenever a bar has been fixed by statute to the legal remedy in a court of law, the remedy in a court of equity has, in the analogous cases, been confined to the same period. I should not have thought it necessary to cite authorities upon points so long and so clearly established, had not the present decision tended, as it appears to me it does, to call them in question, and had it not been of such transcendent importance, that no doubt should exist upon questions so materially affecting the titles to real property.

I shall only add two more authorities, those of the late and present Lord Chancellors of Ireland. The peculiar fitness of referring to the former of those high authorities, in a question of this nature, will be generally felt. To no authority, living or dead, could reference be had with more propriety, for correct information respecting the principles by which courts of equity are governed, than to one whose knowledge and experience enabled him fifty years ago to reduce the whole subject to a system, with such universally acknowledged learning, accuracy, and discrimination,

Lysaght
 of
 Ballinane | Hayes
 157

1820.

Marquis
CHOLMON-
DELEY
v.
Lord
CLINTON.

as to have been ever since received by the whole profession as an authoritative standard and guide. *Viventi tibi presentes largimur honores*. The rule laid down by this high authority in the case of *Bond v. Hopkins* (a), has been already stated, and in *Hovenden v. Lord Annesley* (b), he again examines the doctrine and the cases on the subject, and says, "I think the rule has been laid down, that every new right of action that accrues to the party, whatever it may be, must be acted upon at the utmost within twenty years. In every case of equitable title, (not being the case of a trustee, whose possession is consistent with the title of the claimant,) it must be pursued within twenty years after the title accrues." (c)

In the case of *Medlicott v. O'Donnell* (d), Lord Chancellor *Manners* thus expresses himself, "I think then I stand well supported by principle and authority in saying, that this Court is bound to regulate its proceedings by analogy, or in obedience to the statute of limitations."

Upon the uniform concurrence of this long train of the highest authorities, to which many others might have been added, and to which none are opposed, I can entertain no doubt in the present case. It is clear, that had it been the claim of a legal estate in a court of law, the remedy would have been barred by the statute of limitations. It is therefore clear, that being an equitable estate, the remedy must, by analogy, be equally barred in a court of equity.

Here I might close the argument. Without entering into any detailed consideration of the reasons assigned

(a) 1 Sch. & Lef. 429.

(b) 2 Sch. & Lef. 630.

(c) 2 Sch. & Lef. 636, 637.

(d) 1 Ball & Beatty, 164

for a contrary doctrine, it is a sufficient answer to them, that they lead to a conclusion inconsistent with these authorities. There must be some great mistake in the argument, that supposes it to be open to the plaintiff to come into equity for relief, after having forborne to apply for it more than twenty years; or that the quiet and uninterrupted possession as the absolute owner of the equitable estate during that period, affords no bar, by analogy to the statute of limitations, to the remedy in a court of equity. In deference, however, to the high authority by which this conclusion has been formed, I shall proceed to examine the grounds and principles on which it is founded, and the cases by which it is supported,

1820.
 Marquis
 CHOLMON-
 DELEY
 v.
 Lord
 CLINTON.

The argument may be considered under two heads; first, in respect to the principles that would have applied, had it been the case not of a mortgage, but a tortious possession of an equitable estate during the period of twenty years, the legal estate outstanding and unbarred, and the holder of the rightful equity, not making by himself or by any other for him, any claim till after that period was elapsed, and then applying for relief in a court of equity; secondly, by adverting to the peculiar principles which apply to the case of a mortgage.

The grounds upon which, under the first head, it is contended, that the holder of the rightful equity would not have been barred by laches and nonclaim, are, that the tortious possessor does not claim to be the owner of more than the equitable estate, the legal estate remains unbarred. There is no disseisin, abatement, or intrusion. The possessor is only tenant at will, and may be dispossessed at any time by the trustee of the legal estate. He has, therefore, only a precarious and per-

missive

1820.
 Marquis
 CHOLMON-
 DELLY
 v.
 Lord
 CLINTON.

missive possession; tortious possession can never be the foundation of an equitable title. "An equitable title, it is said, may be barred by length of time; but it cannot be shifted or transferred. What was once my equity may by my laches, be wholly extinguished; but it cannot without my act become the equity of another person. It does not therefore follow, that an equity can be acquired by length of possession, because by length of possession it may be barred." So long as the legal estate remains, the estate is preserved for the rightful equity; the *cestuique trust* can only be barred by barring and excluding the estate of the trustee. (a)

These are the inseparable and necessary incidents of every trust estate. No equitable estate ever can exist without being attended with these consequences. If there can be no bar under these circumstances, there never can be any bar in the case of an equitable estate. The legal estate may be barred, and thereby the equitable estate, but that would be by the statute of limitations operating in a court of law on the legal estate, not by the analogy to the statute operating in a court of equity on the equitable estate. There could be no separate bar in equity. The only forum in which there could be any, would be a court of law. The protection also afforded to the rightful equity merely by the continuing existence of the legal estate, would be productive of the same consequences. This reasoning, therefore, necessarily leads to the entire subversion of the whole system on which the analogy is built and established. It would be to sacrifice substance to form, to make the proceedings of a court of equity governed by the technical forms of a court of law, and the policy of an important public law depend on the form of the

(a) *Vide 2 Mer. 358. 361.*

conveyance. It proceeds on a mistaken view of the manner in which, and the grounds upon which, the bar from length of time operates. The question is never a question as to the title belonging to plaintiff or defendant; time shuts out the enquiry into title, except only to ascertain that the possession has been *de facto* adverse to the claimant; whether, amounting strictly to disseisin, abatement, or intrusion, is of no consequence, provided it has been adverse, that is, inconsistent with the title of the claimant. The defendant in possession has a right to stand on the defensive, and throw upon the plaintiff the burthen of getting over the preliminary plea in bar, by shewing a title to sue, that is, by proving that he has made his entry, or filed his bill within the twenty years. The question respects the plaintiff's right to the remedy, not the defendant's title to the estate. A tortious act can never be the foundation of a legal, any more than of an equitable title. It is no more favoured in a court of law than a court of equity, considered nakedly by itself; but the statutable bar arises from other principles. Admitting the title, if it could be enquired into, to be clearly in favour of the Plaintiff and against the Defendant, still the question is, whether he has prosecuted that title in *due time*. The quiet and repose of the kingdom, the mischief arising from stale demands, the laches and neglect of the rightful holder, and all the other principles of public policy, take away the remedy, notwithstanding the title "*veri domini*," and the tortious holding of the possessor. To advert to the merits is to shift the question from the real subject of enquiry. The case never arrives at that point; it is stopped *in limine*, equally in the courts of equity as of law.

1820.

Marquis
CHOLMON-
DELEY
v.
Lord
CLINTON.

As to the argument of the partial and limited operation of the bar by time on the title in a court of equity,
that

1820.

Marquis
CHOLMON-
DELEY
v.
Lord
CLINTON.

that though it may be lost by laches, it cannot be transferred without the act of the party — the case is the same in this respect both in equity and law; the title is changed in both by the operation of a public law, upon public principles, without regard to the original private right. If the negligent owner has for ever forfeited by his laches his right to any remedy to recover, he has in effect lost his title for ever. What then is to become of the title, whether it be legal or equitable? Is it to become an *hereditas jacens*, belonging to no one? Is it to devolve on the crown, or to pass by escheat? The Plaintiff is barred of his remedy whenever he sues either in law or equity; he is stopt by the plea in bar, and his suit dismissed; this is all that the Court in general has to determine. The Defendant keeps possession without the possibility of being ever disturbed by any one. The loss of the former owner is necessarily his gain; it is more, he gains a positive title under the statute at law, and by analogy in equity. It was decided by Lord Holt, in *Stocker v. Berney* (a), that twenty years' possession gives a title to recover upon in ejectment, and in *Taylor v. Horde* (b), Lord Mansfield says, "twenty years' adverse possession is a positive title to the Defendant. It is not a bar to the action or remedy of the Plaintiff only, but takes away his right of possession."

The continuing existence of the legal estate, unbarred in the old trustee, whilst the rents and profits of the estate are received, and every act of ownership exercised by the tortious holder under a claim of title, as the *cestuique trust*, without in any manner directly or indirectly acknowledging the title of the person to whom the equitable estate may of right belong, will not pre-

(a) 1 Lord Raym. 741.

(b) 1 Burrow's Rep. 119.

vent the possession being adverse to that person, and a bar to the prosecution of his claim in a court of equity, if, without any disability or fraud, he has forborne to bring it forward till after the period of twenty years has elapsed. The trustee, without any collusion or blame, having no means of knowing the merits of the equitable title, and misled by the acquiescence of the person to whom those merits are known, remains passive, or even yields to the only apparent claim of title by the actual possessor, whilst the rightful proprietor, whose duty it is to assert his title by his own suit in equity, or by calling for the aid of his trustee in a court of law, sleeps upon his right, and takes no step of any kind to assert it either in law or equity within the limited period. If, under such circumstances, the mere existence of the old legal estate could have the effect of preventing the bar attaching upon the equitable estate, and carrying back the claim of title to any period, however remote, since the creation of the legal estate, all the principles that have been established respecting equitable estates and titles would be overturned. According to this reasoning, whenever the legal estate is outstanding, in an old term for instance, to attend the inheritance, the earliest equitable title must in all cases prevail; for as that, according to the argument, could never be shifted or transferred without the act of the party, or some rightful conveyance or deduction of title, every subsequent title must be wrongful, and the possession under it being therefore tortious, never could, according to the same argument, be the foundation of an equitable title. Quiet enjoyment for sixty, one or two hundred years, or more, would be no security, if the old term had existed longer. It would always be open to enquiry in whom was vested the equitable title which originally existed when the old term was created, and upon the doctrine of the inseparable and perpetual union of that title with the

1820.
 Marquis
 CHOLMON-
 DELEY
 v.
 Lord
 CLINTON.

1830.
 Marquis
 Cholmon-
 deley
 v.
 Lord
 Clinton.

the legal estate, whoever had become the trustee of the term, whether the same had been assigned or not, if kept alive, must be a trustee for that person. If, therefore, in the present case, the discovery of the supposed mistake in the construction of the deed of 1781, had not been made till near the end of the term of 200 years, the enquiry into title would, upon the same principles that it is now open, have continued to be open then, notwithstanding the exercise of every act of ownership and enjoyment of the estate by the *Clinton* family for near two hundred years. Hitherto conveyancers have considered an old term to be a desirable muniment in the title: but according to this doctrine, it would be pregnant with danger to it, and the more so in proportion to what has hitherto been deemed to give additional value to it, its antiquity, because the older the term the longer would be the period open to a claim of title.

One of the counsel for the Plaintiffs, whose learning and experience entitle him to great respect and attention, particularly on a subject of this nature, has strongly advocated this doctrine in the first argument of this case, but I am disposed to pay more attention to the printed opinion of that same learned counsel, not delivered as an advocate, but in the name and in the behalf of the members of that branch of the profession peculiarly conversant in these subjects, whose general sentiments he, and the learned Counsel to whom his opinion is addressed, were so well entitled to represent. According to that representation, it should seem, that notwithstanding the arguments and opinion delivered in the present case, an old term is still continued to be held by conveyancers in the same estimation as before, and the presumption of its surrender, without sufficient ground, is considered as

"striking at the settled doctrine of centuries, shaking the landmarks of real property, and rendering insecure the title of every purchaser in the kingdom." I concur in the justice of that reasoning, but the doctrine above contended for would lead to an opposite conclusion. The surrender of an old term would then be deemed as necessary for the security of the title, as it is now deemed injurious to it, and would be as eagerly enjoined as it is now deprecated.

1820.
 Marquis
 CHOLMON-
 DELEY
 v.
 Lord
 CLINTON.

But the law on this subject has been long and clearly settled. Every instance in which an outstanding legal estate in the trustee of an old term, has been allowed to operate as a protection to a puisne equitable title against a prior one, is a precedent against the doctrine, that there exists an indissoluble connection between the legal estate and the equitable to which it was at first attached, and that the equitable title cannot be shifted or transferred without the act of the party to whom it belonged.

This point was settled by Lord Cowper in *Wilkes v. Bodington* (a). Before that case, this erroneous opinion seems to have had some existence. "It was once doubted," says Lord Hardwicke, in *Willoughby v. Willoughby*, "whether, if the term were vested in a third person, a trustee generally, and not in the party himself, he should be allowed the benefit of it in equity, because the Court ought to determine for whom the stranger was a trustee, and then the rule is *qui prior est tempore potior est jure*. But this was settled by Lord Cowper in the case of *Wilkes v. Bodington*."

The whole doctrine respecting the protection afforded to purchasers and incumbrances by outstanding legal

(a) 2 Vern. 599.

1820.
 Marquis
 CHOLMON-
 DELEY
 v.
 Lord
 CLINTON.

estates, was established by Lord *Hardwicke* in the great case of *Willoughby v. Willoughby* (a). [His Honor here read several passages from the judgment in that case]. I have cited these passages at large, from the clear manner in which they explain the principles upon which a court of equity acts in dealing with an outstanding legal estate, and from the importance of bringing into notice, under the sanction of this great authority, a doctrine of such general and extensive application, which might appear to have been called in question by the reasoning in the present case. I would add a reference to the highest living authority, the judgment of the present *Lord Chancellor* in the case of *Maundrell v. Maundrell* (b), where he states the beneficial interest of a term to attend the inheritance to be a creature of equity, and to be disposed of and moulded according to the equitable interests of all persons having claims upon the inheritance. "It was very early decided, (his Lordship says,) that if *A.* and *B.* advanced money innocently, and *C.* bought also innocently, not having notice of each other's advances, he, who first had the luck to get in the legal estate, had as good a right as any one, and should hold by his legal title the possession against the prior equities. I collect from all the authorities, that, when the purposes of the trust are once satisfied, in equity the ownership of the term belongs to the owner of the inheritance, whether declared by the original conveyance to attend the inheritance, or not." All these instances of dealing with the legal estate in equity, and disannexing the trust from the strict legal fee, are wholly incompatible with the doctrine of an indefeasible right to the legal estate in the prior equity. The trust of the legal estate does not govern, but follows the equi-

(a) 1 T. R. 763

(b) 10 Ves. 259. 270.

table title. The latter, in the changes which it undergoes by the act of the party, or by operation of law, attracts to, and draws after it the trust of the legal estate. To entitle the puisne equity to a preference over the prior, a sufficient reason must be shewn. The latter must be proved to have been lost, or the former gained by some adequate and lawful means. The mistake seems to be in not observing how, by what authority, and upon what principle the change is effectuated in the case of the bar from laches and non-claim; in not considering that in equity, as in law, the change is produced in the title, not by the act of the party, but, what is of equal avail, by the operation of a public law. Title is entirely out of the question: in most of the cases in which the statute operates at law, or the analogous ones in equity, the wrongful title prevails over the rightful. The statute assumes that to be the case. It is not wanted when the title is perfect; it is only when there is some defect.

It remains to consider the three cases referred to in support of this part of the argument,—the cases of *Hopkins v. Hopkins*, *Harmood v. Oglander*, and *Lawley v. Lawley*. Neither of these is cited for the sake of the decision, as being applicable to the present case, but for what was thrown out by the high authorities, by whom those cases were decided in the course of their judgments. No direct decision in support of the doctrine contended for, has been produced either by the bar or the bench. This is a striking circumstance, and must alone afford a strong presumption against that doctrine, considering the magnitude and extent of the question, and the occasions for its frequent recurrence. The learning and industry so long employed upon this case have not been able to discover, in opposition to the numerous authorities in favour of the bar, a

1820.

Marquis
CHOLMON-
DELEY
v.
Lord
CLINTON.

1820.

Marquis
CHOLMON-
DELEY
v.
Lord
CLINTON.

single case in which it has ever been decided, that such bar was prevented by the existence of an outstanding legal estate. No direct or unequivocal *dictum* even to that effect is produced; but inferences only, from expressions used when the point under consideration was a very different one. These expressions, too, when attentively examined, together with the occasions of using them, will not, as it appears to me, warrant the inferences drawn from them.

It is evident, that Lord *Hardwicke*, in the part of his judgment referred to in *Hopkins v. Hopkins*, did not mean that his observations should have any application to the statute of limitations, or the analogy to it. They were made in a case where no such question had or could have arisen, upon the effect of a devise to trustees, under which the trustees were in possession of the estate. The question was, notwithstanding that circumstance, whether the legal estate given to the trustees generally for the purposes of the will, but not specifically to support the contingent remainders, would support those remainders, or whether they were become void by the death of the tenant for life, when there was no one *in esse* in whom the next limitation could vest, in like manner as they would have been had it been the case of a legal estate, without any trustees inserted to preserve contingent remainders. Lord *Hardwicke* determined in favour of the first of these propositions, and in his reasoning in support of that determination, uses the expressions relied upon. The statute of limitations, or the analogy to it, could not by possibility have the remotest bearing upon the subject. The question arose immediately after the death of the tenant for life, and the trustees were in actual possession. Lord *Hardwicke* must therefore have gone very far out of his way to have introduced any topic of
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this nature. The context shews that he had no such intention. He was speaking of the effect of wrongful acts upon the equitable estate, such as the act he was considering the effect of; viz. the death or forfeiture of the tenant for life, independent of and without regard to actual possession. According to a more correct manuscript note (a), in Lord *Hardwicke's* own hand-writing, of his judgment, which was produced at the bar, and with which I have been furnished, the words "whilst the trustee continues in possession of the land," should have been substituted in the place of the words in *Atkins*, "whilst the trust continues," at the end of the selected passage. The same words are repeated both in the manuscript and in *Atkins*, in the application of the general observations to the case in judgment.

1820.
Marquis
CHOLMON-
DELEY
&
Lord
CLINTON.

"To apply these instances (Lord *Hardwicke* says) to this case; the destruction of contingent remainders by the act of the tenant for life, is considered in law the wrong without a remedy: the law books call it a tortious act. Now if equity has never yet suffered any other of the wrongful acts above mentioned, or any thing similar to them, to gain or transfer an estate, whilst the trustees continued in possession, what reason can be given why this should take place, or why the Court should strive to preserve this power to the cestuique trust for life, the execution whereof the law itself calls a wrong?" The cestuique trust here was an infant, who died soon after his birth, without of course having had any possession of the estate. The trustees appointed to effectuate the purposes of the will were in possession. It was in respect to the immediate effect of wrongful acts upon the equitable estate, under such circumstances, that Lord *Hardwicke* had under his

(a) *Supra*, p. 18. n.

1820.

Marquis
CROLMON-
DELEY
v.
Lord
CLINTON.

consideration, and not the effect of the adverse possession of the estate by a stranger for more than twenty years; the cestuique trust laying by, without making any claim by himself or his trustees, under the analogy to the statute of limitations. The words of Lord *Hardwicke*, as cited, exclude any reference to the statute of limitations. They refer in terms to the wrong, by which an estate may be gained by the common law, by disseisin, abatement, or intrusion, acts that were immediately productive of certain known consequences by the common law, without reference to, or without deriving any aid from time and non claim under the statute of limitations. "Of the mere trust or equitable estate there can be no such thing, (says his Lordship,) whilst the trustees continue in possession of the land." It is not by the technical operation of disseisin, abatement, or intrusion that the statute of limitations produces its effect. The statute requires, as an indispensable preliminary, that the Plaintiff in a possessory action should shew that he has had possession of, or made an entry into the estate within the limited period. The *onus probandi* lies upon him. The enquiry into the nature of the possession is only material with a view to this point, to ascertain whether it has been such during this period, as to make good what the Plaintiff is to prove in order to entitle him to his action; viz. whether it shews him to have had, during any part of the period, by himself or by another, the actual possession; or whether the estate has, during he whole time, been in fact held and enjoyed by an adverse claim of title, that is, a claim not consistent with the title of the Plaintiff. The bar arising therefore from the statute, and the effect of time upon non claim and adverse possession, are subjects totally distinct from the consequences following, by the common law, upon disseisin, abatement, or intrusion. Lord
Hard-

Hardwicke's observations apply entirely to the latter, and have no reference to the former.

1820.

Marquis
CHOLMON.
DELLY
v.
Lord
CLINTON.

This opinion, therefore, of Lord *Hardwicke*, cannot afford any guide or assistance in the present case. Stating what cannot happen to a bare trust, so long as the trustee continues in possession, is no opinion as to what may be the consequence upon a trust estate, when possession is not either in the trustee or the cestuique trust, but in a third person, who, without disturbing the legal estate, claims to be himself the cestuique trust, and enters under that title. Lord *Hardwicke* cannot be supposed to have denied that such a case might not exist, much less that an adverse possession and *quasi* disseisin would not be the consequence, upon which the analogy to the statute of limitations might operate. His Lordship's judgment in the great case of *Casborne v. Scarfe* (a), pronounced in the year preceding that of *Hopkins v. Hopkins*, shews in what light his Lordship considered the possession of an estate under a title merely equitable. The question in that case was, whether the husband of a mortgagor in fee was entitled to be tenant by the curtesy; one of the requisites being, that there should be a seisin in fact. His Lordship in respect to that point says, "the true question is, whether there was such seisin or possession of the equitable estate in the wife, as in this Court is considered as equivalent to an actual seisin of a freehold estate at common law? and I am of opinion there was. Actual possession clothed with the receipt of the rents and profits, is the highest instance of an equitable seisin, both of which there was in this case." According to Lord *Hardwicke's* own manuscript note of this case (b), he states, (speaking of the equity of redemption,) "That

(a) 1 *Atk.* 603.

(b) *App.* No. II.

1820.

Marquis
CHOLMONDELEY
v.
Lord
CLINTON.

it is not considered as a mere right, but as such an estate, whereof in the consideration of this Court there may be a seisin; for without such a seisin a devise could not be good."

If, then, actual possession, clothed with the receipt of the rents and profits, constituted, in the opinion of this great judge, the highest instance of equitable seisin, it follows that the converse, the loss of the possession and of the rents and profits by the equitable owner, must amount to an equitable disseisin. But without disputing about terms, it cannot be denied that if the claimant has possession *de facto* of the estate, and if it is accompanied with an exclusive claim to the equitable title, and to be the only cestuique trust for whom the outstanding legal estate is held, such possession must be deemed adverse to the persons to whom such equitable title may of right belong. In the passage selected from Lord *Hardwicke's* judgment, there is nothing to warrant the inference that it was his opinion, that under such circumstances the person, so dispossessed, would never by any laches and non-claim, continued for however long a period, be barred by analogy to the statute of limitations, but there is, on the contrary, strong internal proof of an opposite inference. It cannot be supposed, that one so conversant with the long established principles of equity, could, when explaining and enforcing the necessity there was for courts of equity, "in general to allow trust estates to have the same consideration in point of policy with legal estates," have meant to deny the existence of the analogy in the case of that statute, the policy of which was of all others most consonant to the principles of equity, and most necessary for the object for which Lord *Hardwicke* was contending, *viz.* to preserve, after the creation of trusts, uniformity in the rules of property between legal and equitable estates. If it had been

been the intention of Lord *Hardwicke* to call in question a point so well established, he would surely have expressed it in terms more unequivocal, accompanied with reasons for a doctrine so novel, alarming, and extensive. He would have waited till the point was brought directly under his consideration, and fully argued at the bar, and not have introduced it incidentally in a case, in which the question had not arisen or been spoken to, and was wholly foreign to the subject before him. I cannot, therefore, consider the opinion of Lord *Hardwicke*, in *Hopkins v. Hopkins*, as affording any authority for the present case.

1826.
Marquis
Cholmon-
deley
v.
Lord
Clinton.

The next case is *Harwood v. Oglander*, which is also referred to, not for the point decided; nor even for any general dicta respecting the present subject; but for the inference drawn from what are supposed to have been the conceptions successively entertained by Lord *Albany* and the present Chancellor in respect to that case. But here again, upon an examination of that case, it will be found that it is to the peculiar circumstances of it, the opinions of both these great judges are exclusively confined, and that they cannot properly be considered to afford any authority or assistance in the present case. Both the judges preface their opinions with observing, that the case was one of an extraordinary nature. Under those circumstances it was, that they concurred in thinking it a material preliminary to the final decision of it, to have it ascertained whether the trustee could recover at law the legal estate, with a view to the decision of the question, whether the representatives of one tenant in common, would, in that case, be entitled to recover in equity against the representatives of the other, the principal subject, which was for farm rents, and an account of the past arrears. No decision took place, either at the Rolls or on the

1820.

Marquis
CHOLMON.
DELEY
v.
Lord
CLINTON.

appeal, as to what would be the consequence of the enquiry which each Court thought must precede any decision, though differing as to the nature of the enquiry. Much less was any determination come to in either Court, or even any opinion given on any general question respecting the statute of limitations, or the analogy to it, or the effect of adverse possession generally, by one claimant of the equitable estate against the other, whilst the legal estate was outstanding in a trustee.

Nothing fell from either of these high authorities from whence it could be collected to be the opinion of both or either, that the mere existence of the legal estate outstanding in a trustee, would, in all cases, and under all circumstances, prevent any bar ever arising in equity, from the adverse possession of the estate by one competitor for the equitable title, and the laches and non-claim of the other, beyond the period limited by the statute of limitations. This general proposition neither did, nor could in that case come under consideration. A period of thirty-two years had elapsed since the title of the Plaintiffs accrued, but the subject of claim being fee farm rents, no bar could have attached to the legal remedy from any statute of limitations, had the application been made to a court of law. It was insisted on behalf of the Plaintiffs, and not denied, that it was open to them to recover in an assise under the statute of *Gloucester*, the whole arrears without limit. There being therefore no legal bar, analogy, if allowed to prevail, would have operated against any equitable bar. Notwithstanding this, however, Lord *Alvanley* manifested throughout the whole case, that strong leaning against any relief being given in equity, in a suit instituted so long after the title accrued, which in other cases distinguish the opinions of

of this learned and able judge. "The Court," he said, "undoubtedly will not do any thing to further such a claim. I should have been extremely glad to have dismissed the bill now; for I should be very sorry to have it understood to be the rule of this Court, that there is no limitation whatsoever to trust estates; and that, let the legal estate once get into a trustee, the cestuique trust may permit others to enjoy the property; and come to this Court at any distance of time for an account. I do not know, that this Court will ever act upon so very broad a principle." This has certainly not the appearance of favouring the doctrine now contended for on the part of the Plaintiffs in the present case. His Lordship afterwards adverts to what was pressed for by the Plaintiffs, viz. a right to recover the rents from the very first, and says, "*That is perfectly alarming, if a man having a trust estate may lie by for any length of time, permitting others to retain the whole profit, and then come for an account. There must be some limitation. I by no means wish to have it understood, that after so long an acquiescence the Plaintiffs are entitled to relief in a court of equity.*" (a)

1820.
Marquis
CHOLMON-
DELEY
v.
Lord
CLINTON.

The Lord Chancellor concurred in thinking, that further enquiry was necessary before a final decision could be made, but differed as to the nature and object of the enquiry, considering that it should embrace the actual state of the title, the dealings of Lawrence the trustee, with the estate, since he had the estate, and what acts, deeds, and assurances had been done and executed respecting the fee farm rents. In other respects, however, he seems to have taken the same general view of the case. His Honor here read several passages from the judgment, in the pages cited below (b), observing, that they

(a) 6 Ves. 217. 225.

(b) 8 Ves. 129—131.

shewed

1820.

Marquis
CHOLMON-
DELEY
v.
Lord
CLINTON.

shewed how much this case depended on its own peculiar circumstances, and how little it involved the decision of any general question. The nature of the property in dispute did not admit of actual entry. *Lawrence* was a trustee for all parties; it was the case of tenants in common, in which, as Lord Mansfield observed, in *Doe v. Prosser* (a), "the possession of one tenant in common, *eo nomine*, as tenant in common can never bar his companion; because such possession is not adverse to the right of his companion, but in support of their common title, and by paying him his share, he acknowledges him co-tenant. Nor indeed is a refusal to pay of itself sufficient, without denying his title." In such a case, some time must elapse before the presumption of actual ouster would take place, and till then the bar could not begin to run, if at all. Possession by a common trustee, and a dealing with him, might in such case be very material to destroy the presumption, and keep alive the true title, to which the possession would in preference, if it could, be referred. It is sufficient if the possession can be made, consistent with the rightful title, to prevent its being adverse. But if the possession had been adverse, still for the reasons before given, it was not a case in which any equitable bar could be set up by analogy, because there being no legal bar, analogy operated the other way. I have dwelt the longer upon this case from an anxiety to shew that nothing appears, in any part of it, to warrant the conclusion, that any sanction was given, either by Lord Alvanley, or the Lord Chancellor, to a doctrine, which is properly characterized by the former as "being perfectly alarming," that so long as the legal estate is not barred, no bar can ever attach upon an equitable title. The tendency of this case,

(a) *Cowper*, 217.

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when the whole of it is considered, is, I think, as far as there is any reference to the subject, to manifest that an opinion in favour of a contrary doctrine was entertained by both the high authorities by whom it was decided.

1830.
Marquis
CHOLMON-
DELEY
v.
Lord
CLINTON.

The third and only remaining case referred to in support of this doctrine, is *Lawley v. Lawley*, decided by Lord *Macclesfield*, and quoted from the report of it in 9 *Modern*. 32., a book of very questionable authority, and the inaccuracy of which was never more strongly shewn than in this report. Lord *Macclesfield* is there represented to have disallowed the plea of the statute of limitations "because the estate in law was in trustees." The report, on the face of it, is unintelligible. It is difficult to understand, how it could be any answer to the statute of limitations pleaded to a bill for an account of what was due from an executor for the overplus of rent received by the testatrix in her lifetime, and afterwards by the executor, that the estate in law was in the trustees. Could the heir, who is admitted to be competent in his own name to maintain the suit, have been excused for having delayed it for fourteen years by an allegation that the trustees, admitting that the suit might have been instituted by them, had also been guilty of the same laches? But, upon a reference to the register's book (c), the whole case, and the proceedings of the Court appear to have been entirely misrepresented in this very incorrect report. The reporter represents the case to have been the subject of only one bill: there were in fact two separate bills, the dates, facts, and circumstances comprised in which, have been blended and confused. The settlement which gave rise to them was made by Sir *T. Lawley*, in 1661. He died in 1696.

(c) *Reg. Lib.* B. 1718. fo. 221., B. 1719. fo. 481., B. 1723. fo. 545.

1820.
 Marquis
 Cholmon-
 delay
 v.
 Lord
 Clinton.

The first bill was filed by his heir at law, who had become entitled to the estate, subject to the widow's limited right to the rents existing at the time of the settlement, in *Easter* term 1715, to restrain by injunction an ejectment brought by the trustees of the settlement against the tenants, who had, at the instance of the heir, refused to pay to the widow the rents exceeding the amount at the time of the settlement. To this bill Dame *Anne Lawley*, the widow, who was one of the Defendants, put in her answer, but died before the suit came to a hearing, which it did in *February* 1718, after being revived against her executor. The register's book states, that it being suggested at the hearing, on the part of the executor, that Lady *Lawley*, instead of having received any overplus of rents, had been in fact underpaid what was due by virtue of the settlement; and he applying for permission to receive from the tenants so much as remained due to her estate, the Court directed the Master to take an account of what was due. The account was accordingly taken before the Master, and in the result, a balance of 243*l.* 15*s.* was reported by the Master due from the widow's estate, she and her executor having received overplus rents to that amount. The Plaintiff then applied for an order of payment to him by the executor of that balance. The Chancellor refused to make the order, because the bill had not been filed for that purpose. The heir was thus put to the necessity of filing a second bill, to compel the executor to pay the sum thus ascertained to be due. This bill was filed in 1720, and it was to this second bill that the executor, for the first time, pleaded the statute of limitations, insisting that some of Lady *Lawley's* receipts of rents included in the Master's report, had taken place fourteen years before. Under these circumstances, it is obvious what
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must have been the ground for disallowing the plea. After the account had been taken, without objection on either side, at the instance and for the benefit of the executor, it was too late when the result turned out unfavourable to him, to set up such a plea. The plea was accordingly overruled, and the executor decreed to pay the balance reported due. Nothing appears in the register to countenance so strange a reason for overruling the plea, as that assigned in 9 Modern. The trustees were no parties to the second suit, nor had any one any concern in the subject of it, (confined as it was to the payment of the precise balance reported due,) except the Plaintiff and the executor of Lady *Lawley*. It is unnecessary to observe further upon this case.

1820.
 Marquis
 CHOLMON-
 DELEY
 v.
 Lord
 CLINTON.

The three last cases, upon which I have been observing in detail, having been selected in the judgment in support of the doctrine, which I consider to be not well founded, seemed to require a particular examination. Upon the cases referred to at the bar for the same purpose, a few observations will be sufficient. The chief of these were *Pomfret v. Lord Windsor*, *Pickering v. Stamford*, and *Lord Grenville v. Blyth*. One answer applies to them all. In none of them did the question turn upon the statute of limitations, or the equitable analogies to it. Lord *Hardwicke*, in the first of these cases, expressly puts the statute of limitations out of the question, and confines the case to presumption, which he shews was fully rebutted by the circumstances. In *Pickering v. Lord Stamford*, Lord *Alvanley*, with great reluctance, was compelled to leave the case to the same criterion, strongly expressing his opinion of the mischief of stale demands, and wishing that twenty years constituted an universal bar. But it was a bill against an administrator for an account of assets, and could not be brought

1820.

Marquis
CHOLMON-
DELEY

v.
Lord
CLINTON.

brought within the operation of, or the analogy to any statute of limitations. In *Lord Grenville v. Blythe*, the period of tortious possession was too short to afford any argument from it; and the ground on which the possession, though adverse in fact, was not considered to so in equity, viz. by a constructive reference of it to the rightful title, proceeds on a principle that can never apply to any case, as I have before endeavoured to shew, in which the question turns upon the statute of limitations, or the analogies to it. The enquiry in such cases must always be as to the fact, whether the possession is *de facto* adverse to, or consistent with, the rightful title. The possession never could in any case be adverse to the true title, if it were to be always governed by a constructive reference to title, and to take its denomination accordingly. The distinction between a possession adverse and not adverse would no longer exist. Every possession, whatever were its real character in fact, would become rightful, in the case of an equitable estate, and so the possibility be excluded of there being any case in which the analogy to the statute of limitations could be applied. The late Master of the Rolls has very ably exposed and refuted this doctrine in the case of *Beckford v. Wade*, already referred to.

Before I close this head, I ought to mention a case omitted to be referred to amongst the authorities in favour of the operation of the equitable bar, notwithstanding the existence of an outstanding legal estate. I mean the case of *Daire v. Beardsham* (a), where, though the legal estate of a copyhold was outstanding in a trustee, the owner of the equitable estate having acquiesced for twenty years in the adverse possession of the person to whom the estate was, by mistake, sup-

(a) 1 Ch. Cas. 39.

posed to belong, was held to be barred in equity, by analogy to the statute, and his bill for relief was on this ground dismissed, though it was clear he would have been entitled to it, had the suit been instituted before the twenty years were elapsed. This is a case directly in point to the present.

1820.
Marquis
CHOLMON-
DELEY
v.
Lord
CLINTON.

I conceive it, therefore, to be established both on principle and authority, that the laches and non-claim of the rightful owner of an equitable estate for a period of twenty years, (supposing it the case of one who must within that period have made his claim in a court of law had it been a legal estate,) under no disability, and where there has been no fraud, will constitute a bar to equitable relief, by analogy to the statute of limitations, if, during all that period, the possession has been held under a claim unequivocally adverse, and without any thing having been done or said, directly or indirectly to recognize the title of such rightful owner by the adverse possessor; and that the operation of the bar in such case will not be prevented by the mere existence of the legal estate unbarred in a trustee, provided nothing be done or said to admit such legal estate to belong to, or to be held in trust for, the rightful owner, but on the contrary the same is uniformly treated as belonging to the claimant in possession, as the sole and exclusive cestuique trust, and, without any fraud or misconduct, is appropriated to his use and benefit.

I have hitherto considered the case as if the contest had been between two persons, each claiming the equitable estate, and the legal estate existing unbarred in a person sustaining without a doubt or question the character of a trustee. It remains to consider how far the case is differed by the peculiarities which belong to the relation of mortgagor and mortgagee, and to a bill seeking

1820.

Marquis
CHOLMON-
DELEY
v.
Lord
CLINTON.

ing the equity of redemption under the circumstances of the present case. In thus considering, first, the question generally as applied to all trust-estates, I have followed what appeared to me to have been the course pursued by the late Master of the Rolls, both in his reasoning, and in the authorities referred to, all of which relate generally to equitable estates. In support of the doctrine contended for in the case of a mortgage no authority of any kind has been referred to; no decision, nor even *dictum* of any Judge has been cited. The proposition, though a general one, applying to the case of every estate upon which there is a mortgage, is now, for the first time, laid down, without any authority of any kind in support of it, and in opposition to all the general principles and authorities on the other side, that the bar from length of time and non-claim never can affect an estate, so long as it is covered by a mortgage; that the claim of title to a mortgaged estate remains for ever open, and may at any time be carried back to the period, however remote, when the mortgage was first made, for one hundred years, five hundred, and even five thousand, if the mortgage or the term originally created in support of it, has continued to exist unbarred. It is singular that a doctrine so general, and so important in its consequences, affecting the title of so many estates at all times, should never have been found out till the year 1812, and that all conveyancers in all periods, and all courts of equity up to that time, should have been acting upon a received opinion directly contrary, without having ever before discovered their mistake. The doctrine is not founded on any reason or principle. The mischievous and alarming consequences of it to the real property of the kingdom, and the opening given by it to vexatious and interminable litigation, in opposition to the most established principles of policy and law, cannot be doubted. The argument in favour of

of it rests upon technical and artificial reasoning upon the nature of a mortgage title, considered with reference to the form of the deed by which it is created, and the consequences of that form in a court of law. It will not be necessary to repeat the answer to this argument, so far as it applies in common to equitable estates in general. It remains only to advert to such part of it as applies peculiarly to the case of a mortgage.

1820.
 Marquis
 CHOLMON-
 DELEY
 v.
 Lord
 CLINTON.

The possession of the mortgagor is stated to be the possession of the mortgagee, and never can become adverse to him. He is a mere tenant at will, having a precarious and permissive possession, the legal right of possession remaining, by admission, in the mortgagee, which he may assert at any moment he pleases. The mortgagee is a trustee for the rightful owner of the equity of redemption. Between trustee and *cestuique trust* the statute of limitations, and the analogy to it, never operate. The right to redeem is still admitted by the mortgagee, and all parties, to exist, and must therefore be given to somebody. Is not the Court bound to give it to the person who shows a title, in preference to him who has nothing to show, but a possession of twenty years? Although the equitable ownership is in the mortgagor, yet his possession is of a more precarious nature than that of any other *cestuique trust*. A court of equity will not interfere to prevent the mortgagee from assuming the possession, as it would do in the case of other trustees. (a)

These appear to have been the principal reasons assigned for this doctrine. I cannot bring myself to adopt them. The view which is taken by them of the relation subsisting between mortgagor and mortgagee,

(a) *Vide 2 Mer. 359.*

1820..

Marquis
CHOLMON-
DELEY

v.
Lord
CLINTON.

and the character, rights, and duties separately belonging to each, is not the view which is taken and acted upon in a court of equity. The relation subsisting between mortgagor and mortgagee is one of a peculiar and anomalous nature, and is regulated not by the form of the conveyance, or the legal consequences and effect of it, but by a system of rules established by a long train of decisions, and universally adopted and acted upon in a court of equity. If the form of conveyance and the legal title were to prevail, the absolute ownership of the estate, after the condition is forfeited, would, in the case of a mortgage in fee, belong for ever to the mortgagee, without any trust or defeasance of any kind. The mortgagor would then be reduced to the condition in which the argument represents him to be. But is that the light in which he is ever considered in equity? Is he there for any purpose ever considered as a tenant at will, holding the possession under the mortgagee? Is any point better established than that a mortgagor, after executing a mortgage in fee, and after the condition forfeited, is still considered to remain the absolute owner of the estate, as he was before, for every purpose, as against all the rest of the world, and as against the mortgagee for every other purpose, except only the security and pledge which the estate is become for, the re-payment of the debt contracted by the mortgage? It would be an useless waste of time, to cite authorities upon a subject so familiar. Lord *Hardwicke*, in the case of *Casborne v. Scarfe*, deciding that the husband of a mortgagee in fee was entitled to be tenant by the curtesy, fully explains this to be the character of a mortgagor, and the reasons for it: as does Lord *Alvanley*, in the case, already referred to, of *Harwood v. Oglander*. In a court of law the mortgagor is nothing; in a court of equity he is every thing. He has the same power to devise and alienate, as he had before

1820.

Margate
Chancery
Bar
of
Lord
Clinton.

before the mortgage, subject only to the incumbrance. A previous will is revoked only *pro tanto* by the mortgage. The mortgagee in fee can only alienate his mortgage interest. The mortgaged estate does not pass under a devise of all his lands, tenements, and hereditaments, made before foreclosure, even though a subsequent foreclosure takes place; as was unanimously resolved by Lord *Comper*, assisted by Lord Chief Justice *Trevor*, and Mr. Justice *Tracy*, in the case of *Litton v. Falkland* (a). In the hands of the mortgagee, the mortgage is considered in equity as a mere personal chattel, which passes to the executor. It is a chose in action, "from whence," Lord *Hardwicke* observes, "it necessarily follows that the nature of the interest of the person who has the equity of redemption must, in the eye of a court of equity, be a real estate; for otherwise the ownership of the land, the real property in equity, would be sunk and vested nowhere, which is not to be admitted, and therefore if it be not in the mortgagee, it must remain in the mortgagor." (b)

Is all this consistent with the doctrine of the mortgagor being tenant at will, and deriving a title to the possession under the mortgage? The mortgagor, who is stated to be tenant at will, when in possession pays no rent, nor is liable to any account of his rents to the mortgagee. The mortgagee, who is treated as having the only title to the equity, if he takes possession, is a bailiff without salary, bound to account for all the rents and profits. The tenant at will, therefore, in possession neither pays, nor accounts for, any rent to his supposed landlord, but the landlord, in the same predicament, becomes an accountable bailiff to his own tenant at will. The possession of the mortgagor, or the person claim-

(a) 2 Vern. 625.

(b) App. No. 2.

1820.

Marquis
CHOLMON-
DELEY
v.
Lord
CLINTON.

ing that character, is not adverse to the mortgagee, because it is consistent with his title. The mortgagee is, therefore, not barred by any length of that possession; but the possession of the mortgagor is adverse to every other claimant of the equity of redemption, because it is inconsistent with his claim of title.

Against him, therefore, it will operate as a bar, if acquiesced in beyond the limited period. Payment of the interest of the mortgage by the mortgagor, or the person claiming to be mortgagor, to the mortgagee, is a recognition of the right and title of the mortgagee, and preserves it unbarred; but it cannot be deemed a recognition of the right or title of any other person to be the mortgagor. It is an act of a directly contrary import. By making the payment in his own name, and on his own account, he takes upon himself to do an act that belongs to the mortgagor, and thereby virtually declares that character to belong to himself. It would be a perversion of inference to convert an act, done for the purpose of the assumption of the character exclusively to himself, into an admission of its belonging to another. The character of the possession is made to undergo an extraordinary change by applying to it the constructive reference to title. The mortgagee having declined the possession and left it, as it was before the mortgage, in the mortgagor, who continues in the actual possession and enjoyment of the rents and profits, for his own absolute use and benefit, as the equitable owner of the estate, his possession, notwithstanding, is by construction considered first to be the possession of the mortgagee; and then his (the mortgagee's) constructive possession, is by a second construction made to be the possession of the person entitled to the equity of redemption. The character of mortgagor would thus be treated as belonging at the same time, for different and opposite purposes, to both

both the claimants: first, for the purpose of taking from Lord *Clinton* the benefit of actual possession, and then for transferring it, through the medium of the mortgagee, to Mrs. *Damer*. Both these cannot be right; the character of mortgagor cannot in both ways be applied to the possession. The argument should be consistent, in treating the character as belonging throughout either to the one or the other of these persons; but it cannot be shifted, assuming the character to be vested for one purpose in Lord *Clinton*, and for another in Mrs. *Damer*. If the actual possession of Lord *Clinton* is to be considered independently, and without reference to the character of mortgagor, it never can be treated as the possession either of the mortgagee or Mrs. *Damer*. If, according to the argument, it is to be qualified by reference to the character of mortgagor, that character cannot at the same time be treated as belonging to Mrs. *Damer*. This double and circuitous construction begins with one principle, and ends with another that is contrary to it; the first proceeding on the principle that the possession of the mortgagor is the possession of the mortgagee; the second, inverting the order, considers the possession of the mortgagee to be the possession of the mortgagor. Neither of these constructive references to title, for reasons before given, can be allowed to take place in a case of this nature, where the question turns upon the statute of limitations, or the analogy to it; the fact only of actual possession is to be considered, concerning the adverse character of which there is in this case no doubt, at least with respect to Mrs. *Damer*. It is said that the mortgagee is a trustee for the mortgagor, that their interests are parts of one title, and together form one entire estate; and that the admission of the title of the one is virtually and of necessity an admission of the title of the other. That the length of time cannot be set up as a bar by the mortgagee against

1820.

Marquis
CROMBIE
DELEY
v.
Lord
CLINTON.

1820.

Marquis
CHOLMON-
DELEY
v.
Lord
CLINTON.

his cestuique trust, *Mrs. Damer*; and that the existence and validity of the title of the mortgagee being on all sides admitted, the benefit of it must be given by the mortgagee (the trustee) to his cestuique trust, *Mrs. Damer*. The equity of redemption is admitted to exist, and must, therefore, be given to the rightful, and not the tortious, owner.

I will consider separately each of these positions, and first, as to that of the mortgagee being a trustee for the mortgagor, upon which so much of the argument is built. That the consequences contended for would not follow, even if the character of trustee did properly belong to the mortgagee, not being in actual possession, I have already endeavoured to show. It may be proper, however, to consider how far, and in what respect, he is to be considered as possessing that character. The position is to be received with considerable qualifications, as will appear by examining what is the true character of a mortgagee, and how he is considered in a court of equity. Lord *Mansfield*, advert-
ing to the comparisons made in respect to mortgages, has, I think, said there is nothing so unlike as a simile, and nothing more apt to mislead. A mortgagor has had ascribed to him a variety of different characters, in which there existed some points of resemblance, when it was not very material to ascertain what his powers or interests were, or to settle with any great precision in what respects the resemblance did, and in what it did not exist. But it would be productive of much error, if it were to be concluded that the resemblance was complete, in every point, to any one of the ascribed characters. The relations of vendor and purchaser, of principal and bailiff, of landlord and tenant, of debtor and creditor, trustee and cestuique trust, have been applied to the relation of mortgagor and mortgagee,

The position that the mortgagee is a trustee for the mortgagor, to be received with considerable qualifications.

gagee, according to their different rights and interests, before or after the condition forfeited, before or after foreclosure, and according as the possession was in the mortgagor or mortgagee. *Quo teneam vultus mutantem Protea nodo?* The truth is, it is a relation perfectly anomalous and *sui generis*. The names of mortgagor and mortgagee most properly characterise the relation; they are, (as Mr. Justice *Buller* observes, in *Birch v. Wright* (a), characters as well known, and their rights, powers, and interests as well settled, as any in the law. It is only in a secondary point of view, and under certain circumstances, and for a particular purpose, that the character of trustee constructively belongs to a mortgagee. No trust is expressed in the contract; it is only raised by implication, in subordination to the main purposes of it, and after that is fully satisfied; its primary character is not fiduciary. It is a contract of a peculiar nature, by which, under certain conditions, the mortgagee becomes the purchaser of a security and pledge, to hold for his own use and benefit. He acquires a distinct and independent beneficial interest in the estate; he has always a qualified and limited right, and may eventually acquire an absolute and permanent one to take possession, and he is entitled to enforce his right by adverse suit *in invitum* against the mortgagor; all which can never take place between trustee and cestuique trust. They have always an identity and unity of interest, and are never opposed in contest to each other. The late Master of the Rolls observes, that in general a trustee is not allowed to deprive his cestuique trust of the possession, but a court of equity never interferes to prevent the mortgagee from assuming the possession. In this the contrast between the two characters is strongly marked.

1820.
 Marquis
 CHOLMON-
 DELEY
 v.
 Lord
 CLINTON,

(a) 1 T. Rep. 383.

1820.

Marquis
CHOLMON-
DELEY

v.
Lord
CLINTON.

By not interfering in this latter case, a court of equity does not, as it is supposed, in opposition to its usual principle, refuse to afford protection to a cestuique trust against his trustee; but the interference is refused, because the mortgagor and mortgagee do not, in this instance, stand in the relation of trustee and cestuique trust. The mortgagee, when he takes the possession, is not acting as a trustee for the mortgagor, but independently and adversely for his own use and benefit. A trustee is stopped in equity from dispossessing his cestuique trust, because such dispossession would be a breach of trust. A mortgagee cannot be stopped, because in him it is no breach of trust, but in strict conformity to his contract, which would be directly violated by any impediment thrown in the way of the exercise of this right. Upon the same principle the mortgagee is not prevented, but assisted in equity, when he has recourse to a proceeding, which is not only to obtain the possession, but the absolute title to the estate, by foreclosure. This presents no resemblance to the character of a trustee, but to a character directly opposite. It is in this opposite character that he accounts for the rents when in possession, and when he is not, receives the interest of his mortgage debt. The payment of that interest, by the person claiming to be the mortgagor, is a recognition of that relation subsisting between them, but is no recognition of the mortgagee's possessing the character of trustee, much less of his being a trustee for any other person claiming the same character of mortgagor.

The ground on which a mortgagee is in any case, and for any purpose, considered to have a character resembling that of a trustee, is the partial and limited right, which, in equity, he is allowed to have in the whole estate legal and equitable. He does not at any time

time possess, like a trustee, a title to the legal estate, distinct and separate from the beneficial and equitable. Whenever he is entitled at all to either, he is fully entitled to both, and to the legal and equitable remedies incident to both; but in equity, his title is confined to a particular purpose. He has no right to either, nor can make use of any remedy belonging to either, further than and as may be necessary to secure the repayment of the money due to him. When that is paid, his duty is to reconvey the estate to the person entitled to it; it never remains in his hands clothed with any fiduciary duty. He is never entrusted with the care of it, nor under any obligation to hold it for any one but himself, nor is he allowed to use it for any other purpose. The estate is not committed to his care, nor has he the means of preventing or being acquainted with the changes which the title to the equity of redemption may undergo, either by the act of the mortgagor, without his privity, or by operation of law, by descent, forfeiture, or otherwise, and consequently, as I have already endeavoured to shew, by the operation of the analogy, to the statute of limitations. When the interest of the mortgage money is tendered to him from year to year by the person who, claiming to have succeeded the original mortgagor in the title to the equity of redemption, is, by the acquiescence of the rightful owner of it, allowed to remain in the quiet and uninterrupted enjoyment of the estate as the sole and admitted owner, can he be expected to refuse receiving it upon any doubts of his own respecting the title, when it is apparently abandoned by those who possess better means of judging of it, and who alone are interested in contesting it? If there is no fraud, or collusion of any kind, the fault lies wholly with those who possess the rightful title to the equity of redemption. The mortgagee is a mere indifferent stakeholder. The real

1820.

Marquis
CHOLMON-
DELEY
v.
Lord
CLINTON.

1820.

Marquis
CHOLMON-
DELEY
v.
Lord
CLINTON.

real contest lies between the competitors for the estate, which, in the hands of either, must continue subject to the mortgage till paid off; when paid off, the mortgage title ends, and then, and not before, the implied trust, to surrender the estate to the person entitled to demand it, begins. If there is a question who that person is, it must be contested, not by the mortgagee, but by the parties concerned, and between them the title must be decided, in the same manner, and by the same principles, though the form in which it may be contested may differ, as it would have been had no mortgage existed. I agree, that the Court to whom the decision of the question is referred, must direct the conveyance to be made to him who shews a title, and not to him who shews none; but I do not agree that Mrs. *Damer* stands in the first of those predicaments, by showing a title that once belonged to her, but which has been forfeited and lost by the operation of a public law, in consequence of laches and non-claim for twenty years; nor that Lord *Clinton* is in the second, who shows quiet and uninterrupted possession and enjoyment during the whole of that period. If no interest upon the mortgage had been paid by any one for the period of twenty years, possession for this length of time, either in the mortgagee, or Lord *Clinton*, would have decided the question of title in favour of that possession. The laches and non-claim of Mrs. *Damer*, must then have been fatal to her claim. The adverse possession of Lord *Clinton* must have prevailed; why should additional acts done by Lord *Clinton*, equally in derogation of her title, and in assertion of his own, and therefore affording additional *indicia* of neglect on her part, and of adverse claim on his, be productive of a contrary effect? I cannot see any ground for it in reason and principle, and there is certainly no authority for it. Payment of the interest operates between Lord *Clinton* and

and the mortgagee, to keep alive the mortgage debt. It is a continued mutual recognition of his title as mortgagor, and that of the person to whom the payment is made as mortgagee. But it has no effect beyond this, or with respect to any other person, except as it tends to exclude the title of any other person to either character. It is an acknowledgment of the title of the original mortgagor, but it is no admission of any title since derived under him, other than that of the person making the payment. To avoid the bar, the title to the equity of redemption, as to every other real estate, must have been either claimed by the party out of possession, or admitted by the party in possession within the twenty years. *Mrs. Damer's* title has neither been claimed or admitted within that period, and therefore cannot now be received.

1820.

 Marquis
 CHOLMON-
 DELEY
 v.
 Lord
 CLINTON.

Constructive possession, upon the ground of the legal right to it in the mortgagee for the purpose of obtaining payment of his debt, even if in such a case it could be admitted, (which it cannot) could not reach beyond the mortgagee himself, and the interests which separately belong to him, in which the dispossessed mortgagor has no concern. From this, therefore, *Mrs. Damer* can derive no benefit. The actual possession by the mortgagee might have had a different effect, because that would have been consistent with her title, and not adverse to it. And yet even this, the actual possession of the mortgagee continued for twenty years, without any payment of interest by the mortgagor, or any thing done or said during that period, to recognize the existence of the mortgage, or to acknowledge it on the part of the mortgagee, would clearly operate as a bar to redemption by the mortgagor. This has been so long and so clearly settled, that it would be an
 useless

1820.

Marquis
CHOLMON-

DELEY

v.

Lord
CLINTON.

useless waste of time to refer to the authorities upon so well known a subject.

What a singular and irrational inconsistency would it be in the system of equitable jurisprudence, if the analogy to the statute of limitations should, universally, and without any doubt or question, by a long train of authorities, from an early period, be applied to such a case, and yet not apply in the present. Many reasons might be urged to prevent the operation of the bar in the former case, which do not exist in the present. Possession in the mortgagee must, at its commencement, have been taken, under the engagement which equity always implies, to account as a bailiff for the rents and profits with the mortgagor, and to apply them to the discharge of the principal and interest of the mortgage debt. If this be not punctually and regularly done, and the account fairly and properly kept by the mortgagee, it is a violation of the implied engagement under which he holds the possession. The possession is all along consistent with the equitable title of the mortgagor, who may be disabled by poverty and distress to enforce the account and redemption. Yet such is the prevalence of analogy in equity, that even under such circumstances, the possession of the mortgagee for twenty years, without a recognition of the mortgage title, or any account kept upon the footing of it, becomes a subject of equitable bar to redemption, notwithstanding a clear title to redemption in the one party, and on the other side a continued misapplication of the rents and profits of the estate committed to his care, contrary to his engagement, and a continued breach of duty from the beginning to the end of the period, in omitting to keep the account. In the present case none of these circumstances occur; the possession is taken adversely, under no contract express or implied, by a stranger,

stranger, between whom and the person wrongfully kept out of possession, there is no privity or engagement of any kind, who is under no obligation to render any account, whose possession is, from the first, inconsistent with, and therefore adverse to the title of the rightful mortgagor. Surely, upon every principle of reason and equity, the same analogy to the statute of limitations which prevails in the one case, must *a fortiori* prevail in the other.

1820.
 Marquis
 CHOLMON-
 DELEY
 v.
 Lord
 CLINTON.

I have dwelt the longer upon this subject in deference to the high authority by which the opinion, which I have ventured to controvert, has been delivered. Independent of that deference, I cannot say that, after long and attentive consideration and research, I entertain the least doubt upon the subject, and I feel it incumbent on me so to declare, in order that whatever weight may be thought due to so humble and inferior an opinion, may take the chance of operating in favour of a doctrine, the existence of which I conceive to be of the highest importance to the security of real property, and to have been long and clearly settled by the highest authorities; and, in respect to which, the safety of titles, the uniformity of the rules of property, and the quiet of the kingdom, I cannot help thinking to be deeply interested, in preventing its being considered as one that can now be drawn into question or disturbed.

It is upon this ground alone, and I am anxious that it should be distinctly so understood, without resting upon any of the other points in the cause, I think this bill should be dismissed.

Bill dismissed, without costs. (a)

(a) The decree dismissing the bill having been enrolled, the Plaintiffs appealed to the House of Lords. By the directions

1820.

Marquis
CHOLMON-
DELEY

v.
Lord
CLINTON.

reactions of the House, the case was argued with reference to the equitable points only, on the supposition that the construction of the ultimate limitation in the deed of 1787 was in favour of the Appellants. On the 15th of June 1821, judgment was given, affirming the decrees, on the ground of the length of time which had elapsed between the entry of the late Lord Clinton and the filing of the bill.

The Lord Chancellor, in moving the judgment of the House, began by observing on the consequences which would result from the doctrine, that the equitable estate could not be barred so long as the legal estate in the trustee subsisted, as applied to attendant terms. The connection between the legal estate in the term, and the equities of the persons entitled to the inheritance, he considered by no means indissoluble; and instanced the case of a second mortgagee, without notice of the incumbrance of the first, getting in an outstanding term, by which he shifts to himself the equity that was previously in the first. With respect to the deed of confirmation, he thought that it might be produced as matter of defence, without filing a bill to reduce its effect, if the Court could clearly see that it went beyond what was intended; but, under all the circumstances, he doubted whether a court of equity ought to interfere against it; certainly it ought not, as against Sir L. Palk, without further enquiry; it was impossible to assume that he had no knowledge of the deed of confirmation, merely because it was not recited in his mortgage. On the point of the length of time, his Lordship adverted to the general principles adopted by courts of equity on that subject, and observed on the vast difference between trusts, some being express, some implied; some relations formed between individuals in the matters in which they deal with each other, and in which it could hardly be said that one was trustee and the other cestuique trust, and yet it could not well be denied that for some purposes they were so. Of this kind he took the relation between mortgagor and mortgagee to be. In the case of a strict trustee, it was his duty to take care of the interest of his cestuique trust, and he was not permitted to do any thing adverse to it; a tenant also had a duty to preserve the interests of his landlord, and many acts therefore of a trustee and a tenant, which, if done by a stranger, would be acts of adverse possession, would

not

not be so in them, from its being their duty to abstain from them. But the case of a mortgagee was different, he being at liberty to hold possession; and not becoming strictly a trustee till the money was tendered to him, and having a right, if he continued in possession for twenty years without acknowledging the mortgage, to turn round on the mortgagor and say that the estate was his own. His Lordship could not agree to, and had never heard of such a rule, as that adverse possession, however long, would not avail against an equitable estate; he meant, where there was no duty, which the person who has it has undertaken to discharge for him against whom he pleads adverse possession. The possession of Lord *Clinton* was adverse; it had been said that it was taken by consent, founded on mistake; but that did not make the possession the less adverse, because Lord *Clinton* took and kept it for himself, where he owed, as it appeared to him, no duty to Lord *Oxford*. He concluded by stating his opinion to be, that adverse possession of an equity of redemption for twenty years was a bar to another person claiming the same equity of redemption, and worked the same effect as disseisin, abatement, or intrusion, with respect to legal estates; and that for the quiet and peace of titles and the world, it ought to have the same effect.

Lord *Redesdale* was clearly of opinion that the Plaintiffs were barred by the effect of the statute of limitations, and that the bill should therefore be dismissed. He wished it to be understood, that his decision rested principally on that ground; but he was also of opinion that the deed of confirmation had such an effect on the property, that it would be against conscience now to interfere. He further observed, that, upon this bill, no decree could be made, because the co-plaintiffs claimed in opposite interests; and that it was a sufficient objection, that their rights might be litigated on two distinct bills, in which the Court must decree that one of them had no title. The difficulty was sought to be got rid of by the agreement between them; but the agreement being made by persons out of possession, and who therefore, though they might release to the person who was in possession, could not deal with others, was contrary to law, and if it existed rendered the parties liable to considerable penalties. His Lordship, in the course of his address, remarked, that

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1820.

Marquis
CHOLMON-
DELEY
v.
Lord
CLINTON.

Adverse pos-
session of an
equity of re-
demption for
20 years is a
bar

1820.

Marquis
CHOLMON-
DELEY

v.
Lord
CLINTON.

No relief in equity, after 20 years, even in cases analogous to those, in which a writ of right would lie at law.

it had been argued that the Marquis *Cholmondeley* might, at law, have had a writ of right; that was a writ to which particular privileges were allowed, but courts of equity had never regarded that writ, or writs of formedon, or others of the same nature; they had always considered the provision in the statute of *James*, which applied to rights and titles of entry, and in which the period of limitation was 20 years, as that by which they were bound, and it was that upon which they had constantly acted. He considered that the statute was a positive law which ought to bind courts of equity, and that the legislature must have supposed that they would regulate their proceedings by it. His Lordship, as well as the *Lord Chancellor*, questioned the accuracy of the report in *Atkins* of the case of *Hopkins v. Hopkins*. (a)

APPENDIX, No. I.

FAREWELL v. COKER.

(2 Mer. 354. Reg. Lib. A. 1725. fo. 471. A. 1726. fo. 197.)

Robert Coker, the brother of the Appellant was seized in fee simple of an estate at *Mappowder*, subject to a charge of debts and portions. He was also seized in tail of the estates in question in this cause, situated at *Frome*, *Dorchester*, and *Fordington*, the reversion of which had passed to the appellant under a general residuary clause in her father's will; but it was alledged by her that she was ignorant of this right, it being supposed by all parties that the estates were subject to some old entail, by virtue of which they would, on the death of *Robert Coker* without issue, descend to *Thomas Coker* his uncle, as the heir male of the family.

(a) The points in which that report differs from the judgment delivered by Lord *Hardwicke*, as far as respects the passage cited by Sir *William Grant*, will be seen by a reference to the note in page 18. *supra*.

The appellant was entitled to a portion of 1000*l.*, and to 500*l.* her share of the portion of a deceased sister; she had also a demand against her brother in respect of the personal estate of the father, of whom she was the surviving executrix and residuary legatee. On a settlement of accounts in *January 1722*, the whole sum due to her was ascertained to be 2134*l.*; 2000*l.*, part of which, her brother secured to her by a mortgage on the *Mappowder* estate; for the remainder he gave his promissory note, and also executed to her a deed of indemnity against the father's debts, in consideration of which the release in question was made. It is not easy to collect the terms of this instrument; the statement in 2 *Mer.* 354. is the same as that in the respondent's case, and in their cross bill (a); but in their answer (b) it is set out at greater length, and in different language. The appellants do not set it out, but their case asserts that none of the parties, not even the attorney who prepared it, knew that the sister was entitled to this reversion; and as evidence of this it states that the lands in question were not included in it, except by the general words "*or elsewhere in the county of Dorset,*" while other property of less importance was particularized by name.

The appellant did not (as was alleged) discover her right to the reversion, till after the death of *Robert Coker* the brother, who left no issue. The bill was then filed to be relieved against the release and the settled accounts, relying chiefly on charges of fraud and imposition alleged to have been practised on the appellant by her brother, and his attorney, who was made a party. The bill also sought to set aside the brother's will, as obtained by fraud. But it seems that the proof of fraud failed, and the decree declared that there was no reason to impeach the account; and as to the relief sought against the release, his Lordship did not think fit to set aside the same; but it appearing that the interest claimed by the plaintiffs in the said manor, &c. was not intended by the said plaintiffs to be included therein, his Lordship ordered that if they should bring an action at law to try their title at law, the release should not be made

1820.

Marquis
CHOLMON-
DELEY

v.
Lord
CLINTON.

Append.

(a) *Reg. Lib. A.* 1726. fo. 127. (b) *Reg. Lib. A.* 1725. fo. 471.

1820.
 Marquis
 CHOLMON-
 DELEY
 v.
 Lord
 CLINTON.
 —
Append.

use of; and that the bill, as to that part, was to be retained till their right should be tried at law. (a) On the re-hearing, the issues mentioned in 2 *Mer.* 354. were directed (b), and the decree was affirmed by the House of Lords in *March* 1727. The issues were ultimately decided in favour of the appellants (c), and the bill was then ordered to be retained for a year, in which time the appellants were to proceed at law, and the release was not to be set up. (d)

APPENDIX, No. II.

ELIZABETH CASBURNE and MARY CASBURNE,
 PLAINTIFFS.
 ALEXANDER INGLIS and ELIZABETH SCARFE,
 DEFENDANTS. (e)

The LORD CHANCELLOR.

March 25.
 1738.

The general question in this case is, whether the husband can be tenant by the curtesy of an equity of redemption on a mortgage in fee. This depends upon two considerations; First, what kind of interest an equity of redemption is in the eye of the Court; Secondly, what is requisite to entitle a husband to be tenant by the curtesy of an equitable interest in land, where the wife had not the legal estate.

First, as to the nature of the interest, — An equity of redemption is considered as an estate in the land; it will descend, may be granted, devised, entailed, and that equitable estate may be barred by a common recovery. This proves that it is not considered as a mere right, but as such an

(a) *Reg. Lib. A.* 1725. fo. 471. (b) *Reg. Lib. A.* 1726. fo. 197.

(c) 2 *P. W.* 565. 1 *Swan.* 390. n.

(d) *Reg. Lib. A.* 1729. fo. 282.

(e) 1 *Atk.* 603. The editors are enabled, by the kindness of Mr. Pepys, to insert a copy of Lord Hardwicke's MS. note of his judgment in this case.

estate whereof, in the consideration of this Court, there may be a seisin, for without such seisin a devise could not be good.

The person having the equity of redemption is considered as owner of the land, and the mortgagee as entitled only to retain it as a security or a pledge for a debt. For this reason a mortgage, though in fee, is considered in this court as personal assets, and shall go to the executor, notwithstanding that the legal estate vests in the heir in point of law. The husband of a *feme* mortgagee shall not be tenant by the curtesy of the mortgage, unless the mortgage be foreclosed, by which it ceases to be a pledge. It shall not pass by a devise of all his lands, tenements, and hereditaments. This was unanimously resolved by Lord Cowper, assisted by Lord C. J. Trever and Mr. J. Tracy, in the case of *Liton v. Falkland*. (a) The words are, "It was unanimously agreed, first, that mortgages in fee, although forfeited when the will was made, did not pass by the general words; although he afterwards foreclosed those mortgages, or obtained a release of the equity of redemption, they should not pass by a will, but go to the heirs at law; this shews that the release of the equity of redemption, or foreclosure, is considered in equity as a new purchase or acquisition of the real estate in the land."

On the like reason, in the case of *Burnet v. Kynaston* (b), a mortgage in fee of the wife was held to be only a chose in action; now if this be the nature of the mortgagee's interest in the eye of this court, it will follow necessarily from hence that the nature of the interest of the person who has the equity of redemption must, in the eye of this Court, be a real estate; for otherwise the ownership of the land, the real property in equity, will be sunk and vested no where, which is not to be admitted, and therefore if it be not in the mortgagee, it must remain in the mortgagor. This will be further proved by considering the common case of a mortgage in fee made after a devise of the land. It is, in law, a total revocation of the devise; but, in the consideration of equity, it is only a revocation *pro tanto*, it amounts to the same as letting in a charge upon it. The true ground of this is, that

1890.

Marquis
CHOLMON-
DELEY
a.
Lord
CLINTON.
—
Append.

(a) 2 Vern. 685.

(b) 2 Vern. 401.

1820.

Marquis
CHOLMON-
DELEY

v.
Lord
CLINTON.

—
Append.

the ownership of the land doth, in equity, remain in the mortgagor, and therefore it shall pass by his devise though made precedent to the mortgage.

It has been objected, on the part of the plaintiffs, that an equity of redemption is only a right of action in equity, to be recovered on certain terms, but what I have already said proves this not to be well founded; it is no otherwise a right of action in equity than any interest is which a man cannot come at but by suing a subpoena, as the law books term it; and that is the case of every mere trust of land, which is admitted to be considered always as a real estate by this Court. To say this is a mere right of action in equity, will be to fall under the difficulty which I just now took notice of, that then the estate in the land will be in nobody; for it has been determined in this court, that the mortgage is only in nature of a chose in action, and the objection which I am now considering affirms the equity of redemption to be a chose in action also. It has also been objected that a mortgagee is not a bare trustee for the mortgagor. It is true that a mortgagee is not barely a trustee; but it is sufficient for this purpose that he is in fact a trustee. He is owner of the charge or incumbrance upon the mortgaged premises, and is entitled, in his own right, to hold the same as a pledge for his debt; but as to the inheritance descendible, the real estate in the land, he is a trustee for the mortgagor till the equity of redemption is foreclosed, either by decree or by such a length of time as courts of equity allow to bar a redemption.

The next consideration is, what is requisite to entitle the husband to be tenant by the curtesy of an equitable estate in land, where the wife had not the legal estate during the coverture. At common law, four things are necessary to make a tenancy by the curtesy: — Marriage; the having issue, which, by possibility, may inherit the land; death of the wife; seisin of the wife in fact, during the coverture. So it is laid down in *Co. Litt.* 30. a. It is admitted that the three first of these requisites concur in the present case; but the objection relied upon is, that there was no actual seisin of the wife during the coverture, which, as it has been contended, is necessary, as well in the case of an equitable estate as of a legal one. That no actual seisin of the freehold was in the wife must be admitted, nay, it must be admitted that she had no seisin whatsoever of the legal estate, either in fact

or

or in law. But that is beside the question, for it proceeds upon a supposition that there can be no such thing as a tenancy by the curtesy of an equitable estate. This argument, therefore, proves too much, and will contradict and overthrow many cases which have been determined and settled, for which reason it is not to be admitted.

The true question upon this point is, whether there was such a seisin, or possession in the wife, of the equitable estate in the land, as, in the consideration of this Court, is equivalent to an actual seisin of the freehold at the common law; and, upon the best consideration which I have been able to give this case, attended with the greatest deference for the decree already pronounced, I am of opinion that there was such a seisin.

By the reasoning which I have already offered under the first head, I think I have shown that an equity of redemption, even upon a mortgage in fee, unforeclosed; is the ownership of the land, or the real estate in equity; then there must be such a thing as a seisin of it in the notion of equity, and what other seisin could there be besides that which the defendant *Inglis* and his wife had in this case.

The mortgage was made but in the year 1728. (a) In 1729 *Anne Casburne* married the defendant *Inglis*. In 1731 she died, leaving issue a son, inheritable; and as there was no foreclosure, so the wife, all along, continued in possession of the estate, and though that possession was, at law, but as tenant at will to the mortgagee, yet, in equity, it was, as owner of the estate, subject to the pecuniary charge or incumbrance; so that here was an equity of redemption, clothed with an actual possession and receipt of the profits, which had never been interrupted. From hence it follows that there cannot be a higher instance of an actual seisin of an equitable estate. The question then will be reduced to this, whether there can be a tenancy by the curtesy of an equitable estate of the wife? but that has been so often de-

1820.

Marquis
CHOLMON-
DELEY
v.
Lord
CLINTON.

Append.

(a) This fact is stated in the pleadings; from which it also appears that *Anne Casburne* derived the estate in question under a settlement made by her father, and not under his will, as mentioned in the report in *Alkins*, (vol. 1. 603.) But the mortgage to the defendant *Scarfa* was made by *Anne Casburne* after the father's death, as stated in that report, and she was then entitled to the estate in fee simple in possession.

1820.

Marquis
CHOLMON-
DELEY

v.
Lord
CLINTON.

—
depend.

terminated, that I take it to be the settled law of this court; it is founded on the maxim that equity follows the law, which is a safe as well as a fixed principle, because it makes a substantial rule of property certain and uniform, let the form or mode of that property be what it will. In the case of *Lady Williams v. Sir Bowcher Wray (a)*, it was taken as settled; and two cases are there cited, wherein it was determined that the husband should be tenant by the curtesy of a trust estate. (b) This is so clear and known, that it was admitted by the counsel for the plaintiff; and yet the case of a trust estate, subject to debts, differs very little from a mortgage in fee; nay, if the trustees are in possession, it seems to me much stronger against the claims of the husband than the present case. The case of *Sweetapple v. Bindon (c)* went a great deal further. In that case Mrs. Bindon gave a sum of money to be laid out by her executors in the purchase of lands, to be settled on *Mary*, her daughter in tail, with remainder over. The mother died; *Mary*, the daughter, married the plaintiff *Sweetapple*, and had issue by him. The issue died, and *Mary* the wife died. The surviving husband brought this bill, to have the money laid out in lands, and settled on him for life, as tenant by the curtesy.

On the hearing of the cause, my Lord *Cotter* adjudged that the husband was entitled to be tenant by the curtesy, and decreed the money to be laid out in land, and the land, when purchased, to be settled on the husband for life accordingly. In the present case, the principal objections relied upon were two: First, that there was a laches in the husband, for that he might have paid off the mortgage money, or brought his bill to redeem, and thereby have gained the legal estate, and that it was his neglect not to do it.

Secondly, — That it has been determined that a wife shall not be endowed of an equity of redemption; and the rule ought to be equal between husband and wife.

As to the first, it was compared to the laches which the law imputes to a husband in not making an entry. One answer to this objection is, that the comparison will not hold; for it is by no means to be presumed to be so easy to pay off the mortgage money as to make an entry.

(a) 2 Vern. 580.

(b) *Ball's* case, and the case of *Worthington and Fletcher*.

(c) 2 Vern. 536.

The mortgagee is, by the rules of this court, entitled to six months' notice before he is obliged to take the mortgage money. If a bill is to be brought, a much greater delay and more difficulties will occur.

But the clear answer to this objection is, that it equally holds in the case of a trust estate, or of a sum of money to be laid out in the purchase of lands. If it had been a mere trust estate, the husband might, with more ease, have obtained a decree for a conveyance, than, in the case of a mortgage, for a redemption; and in the case of *Sweetapple v. Bindon*, the husband might undoubtedly have brought his bill to have the money laid out in a purchase of land. But this was not allowed to be a sufficient objection in either of these cases. This objection, however, was endeavoured to be strengthened in the case now in judgment, by alledging that the husband might be encouraged to suffer the interest to run on upon the mortgage, without redeeming, so as to load the estate. I own I do not quite take the force of that reasoning; if it means the interest accruing due, during the life of the wife, I apprehend that is not to be regarded, for the husband and wife being owners of the estate, may do what they will with their own; the heir of the wife is in herself, and has no right to object that his ancestor has left too great a burden of interest upon him. If it means the interest to incur after the wife's death, and during the subsistence of the tenancy by the curtesy, the heir will have the same remedy in this court against the tenant by curtesy as against any other tenant for life, to compel him to keep down the interest.

Secondly, as to the other objection, that it has been determined that a wife shall not be endowed of an equity of redemption of a mortgage in fee, and that the rule ought to be equal: this proves abundantly too much; for it has been also determined that a wife shall not be endowed of a mere trust estate, of which it is admitted that the husband shall be tenant by the curtesy. This shews that the argument drawn from the case of dower to the case of tenancy by the curtesy of an equitable estate, entirely fails upon the precedents of this court. How it came to be so settled at first is of a difficult consideration, and perhaps it may be hard to find out a sound reason for it, but it is safest to follow and adhere to that which has been settled and established.

1820.

Marquess
CHOLMONDLEY

v.
Lord
CLINTON.

Append.

1820.

Marquis
CHOLMON-
DELEY

v.
Lord
CLINTON.

—
Append.

When any dissatisfaction has been expressed concerning any of the determinations, it has generally been at the denying of dower to the wife, not at the allowing an estate by the curtesy to the husband; and if any alteration was to be introduced, the nearest way, in my humble apprehension, to attain the mere right, would be to allow the wife to have dower of a trust estate, not to disallow the tenancy by the curtesy of the husband. But, as things now stand, I take the ground of those cases, wherein the wife has been refused the aid of this court to have dower of an equity of redemption of a mortgage in fee, to have been, that she could not have it of a trust estate, which was still building on the same principles; and if that were so, the consequence, in the case of tenant by the curtesy, holds just the contrary way, for the husband is allowed to be tenant by the curtesy of a mere trust estate, nay, of money to be laid out in land; and therefore, by parity of reason, by analogy to that case, he ought to be so of an equity of redemption, especially where the wife continued in possession all her lifetime. As to the case of *Penville v. Luscombe*, which was mentioned to have been heard at the *Rolls* on the 4th February 1728, it was a pauper cause; and one question there was, whether there might be a *possessio fratris* of an equity of redemption. I have read over the decretal order in the Register's book, and it concludes that his Honor declared he would take time to consider of that point before he delivered his opinion, and I cannot find that it was determined, or ever came on again.

In the argument of the cause on the part of the plaintiff, this case was put: — Suppose a *feme sole* conveyed land to *J. S.* in fee, subject to a condition of re-entry, on payment of a sum of money by her or her heirs at a certain day, then marries, has issue, and dies before the day, and after her death, her heir pays the money at the day, and enters, shall the husband be tenant by the curtesy?

If this case was meant of a mortgage, subject to a condition of redemption, then the case is the same with the present, and will fall under the same determination; but if it was intended of a purchase, subject to a bare condition of re-entry at law, most clearly he will not; for in that case the wife, after her conveyance, and before the re-entry, had neither a seisin nor estate in the land, she had neither *jus in re* nor *jus ad rem*, and it would be to make the husband tenant by the curtesy of a mere right, a condition, a power
of

of revocation or possibility; that cannot be. This latter case, however, has no kind of resemblance to that now in judgment. For these reasons I am of opinion, that the defendant *Inglis* is entitled to be tenant by the curtesy of the mortgaged premises, and therefore that this part of the decree ought to be reversed.

1820.
 Marquis
 CHOLMON-
 DELEY
 v.
 Lord
 CLINTON.
 Append.

APPENDIX, No. III.

JULYAN PENVILL, - - - PLAINTIFF;
 SAMUEL LUSCOMBE and Others, DEFENDANTS,

(*Mosely*, 72. 122., cited 1 *Atk.* 604. *Reg. Lib.* B. 1728. fo. 232.)

George Luscombe, by his first wife, who died in 1684, had one son, *Samuel*, and one daughter, the plaintiff; by his second wife he had one son, *George*; he married his third wife in 1690, and by her had two sons, *Philip* and *John*, and one daughter, *Elizabeth*. On the occasion of his third marriage he entered into a bond, with his brother *Samuel Luscombe* as his surety, for payment of 300*l.* to his wife, in the event of her surviving him. At the same time he gave to his brother another bond, to indemnify him against that in which he had joined; and afterwards, on the 3d *July* 1696, as a further security, he, by lease and release, conveyed the premises in question, called *Kilbury Parks and Meadow*, to his brother in fee, with a proviso for a re-conveyance in case he the said *George Luscombe*, his heirs, executors, or administrators, should deliver, or cause to be delivered, to the said *Samuel Luscombe* the bond wherein the said *Samuel* was bound for the said *George*, cancelled, or ready so to be, on or before the 29th of *September* then next; and, in the mean time, keep indemnified the said *Samuel* from all demands by reason of the said engagement. By his will, also dated the 3d *July* 1696, (which it seems did not affect his real estate) he gave to his eldest son, *Samuel*, 40*l.*, part of 100*l.* owing to him from his brother *Samuel*, and the re-

A. having a son and daughter by one venter, and a son by another, conveys lands to *B.*, his surety in a bond, as an indemnity, and dies. *B.* pays the bond, and mortgages the lands. The eldest son dies. The mortgagee having been in possession without account or acknowledgment, *semble*, there was no *possessio fratris* of the equity of redemption.

Plea by administrator *durante minoritate* to bill

for account, of a suit by the executor for the same purpose in the Ecclesiastical Court, and sentence, allowed as a stated account, with liberty to except as to subsequent receipts, and an issue directed as to the payment of a particular sum.
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1820.

Marquis
CHOLMON-
DELEY

v.
Lord
CLINTON.

Append.

maining 60*l.* he gave to the plaintiff. He made his sons, *Samuel* and *George*, his executors and joint residuary legatees; and *Paul Luscombe*, his brother *Samuel*, *Jervis Veale*, (who did not act), and *Nicholas Abbott*, his trustees. After his death, his sons being infants, the three trustees, *Paul* and *Samuel Luscombe*, and *Nicholas Abbott*, proved the will, and administration *durante minore etate* was granted to them; but *Samuel Luscombe* chiefly acted, and collected the testator's personal estate.

On *George Luscombe's* death, his wife having survived him, the jointure bond became in force, which *Samuel Luscombe* as surety, paid; he also possessed himself of *Kilbury Parks and Meadow*, and mortgaged them to one *S. Hill* for 150*l.*, which he applied towards the discharge of the bond; the testator's property being, as he stated, not sufficient for payment of his debts and legacies. The 150*l.* being afterwards called in by the executrix of *S. Hill*, was paid by *Abraham*, the son of *Samuel Luscombe*, and the mortgage assigned to him. *Abraham*, upon this, took possession of the premises, and held them, treating them as his own. Upon his marriage, in 1711, he settled them to the use of himself for life, with remainder to his wife for life, remainder to his sons in tail male, remainder to his daughters in tail, remainder to his own right heirs. He died before the filing of the bill, and his widow then entered into possession.

The testator's son, *Samuel*, came of age in 1701, and some years afterwards died intestate and unmarried; his brother *George*, the second son, survived, and died also intestate and unmarried. The plaintiff, by her bill (filed about the year 1716 or 1717), claimed the equity of redemption of the premises, as heir at law to her brother *Samuel*, of the whole blood. This claim was contested by *Philip Luscombe*, the third brother, a defendant, who claimed as heir at law to his father; and also by the widow of *Abraham Luscombe*, who by the plea (the benefit of which, on argument, was saved to the hearing) denied notice of the premises being subject to any equity of redemption, and insisted on her right to hold them under her settlement, as in the nature of a purchaser for a valuable consideration.

The plaintiff had taken out administration to her father, and her brothers *Samuel* and *George*, and also sought against *Samuel Luscombe*, the acting administrator, payment of the

two legacies of 30*l.* and 40*l.*, and an account of her father's personal estate.

To this the defendant *Samuel Luscombe*, pleaded, that *Samuel Luscombe*, the plaintiff's brother, and one of the testator *George Luscombe*'s executors, attained his age of 21 years on the 9th of *February* 1701, and that the power which the defendant had over the personal and testamentary estate of the said testator, *George Luscombe*, as one of the administrators, with the will annexed, during the minority of *Samuel Luscombe*, his co-executor, determined; and the said *Samuel Luscombe*, the executor, having made probate of the said will, cited the defendant and his co-administrators to appear in the Consistory Court of *Exeter*, to account for the personal and testamentary estate of the said testator; and upon the defendant's appearance, *Samuel Luscombe*, the executor, libelled against the defendant; and the defendant put in his answer; and the cause was at issue in the court, and was afterwards heard and determined about the 9th of *February* 1704; and the defendant was sentenced to pay *Samuel Luscombe*, the executor, 30*l.* 13*s.* 1½*d.*; that he paid the same accordingly, and the defendant made a full discovery of the personal and testamentary estate of the said testator come to his hands, and no part thereof afterwards came to the defendant's hands; and that the allowance and disbursements craved by the defendant were true and reasonable; and that the defendant delivered up, before payment of the said 30*l.* 13*s.* 1½*d.*, all his papers, accounts, and vouchers relating to the estate of the testator; and that he, upon his account in the Consistory Court, was charged with what he owed or stood indebted unto the estate of the said testator.

The plea was argued before Lord *Cowper*, when his Lordship declared that the said plea was a good plea, as to the account therein mentioned to have been stated, and that the said stated account ought not to be ravelled into; and did therefore order that the said plea should stand and be allowed as to the said stated account; and that as to what hath been received since the said stated account, the said plea do stand for an answer, with liberty to except thereto; but the said plea being informal in some parts thereof, the defendant was to lose the costs in respect of allowing the said plea. (a)

1820.

Marquis
CHOLMON-
DELEY
v.
Lord
CLINTON.
Append.

(a) *March* 6. 1718. *Reg. Lib. B.* 1717. fo. 157

1820.

Marquis
CHOLMON-
DELEY

v.
Lord
CLINTON.

—
Append.

The cause did not come to a hearing till *December 1728*, previously to which an order was obtained by the plaintiff, to read the depositions of witnesses taken in the Consistory Court of *Exeter*, saving just exceptions. (a) At the first hearing, the cause was ordered to stand over till the next term; and the defendant, *Samuel Luscombe*, was then to produce the accounts of the personal estate of *George Luscombe*, stated in the spiritual Court, referred to in his plea. (b) The plaintiff afterwards obtained an order to examine a witness to prove *vivâ voce*, at the hearing, copies of the answer of the defendant *Samuel Luscombe* and his co-administrators, to the articles exhibited against them by *Samuel Luscombe*, the plaintiff's brother, the account of *George Luscombe's* estate, exhibited by the administrators in the Archdeacon's Court of *Totness*, and the depositions of witnesses. (c)

At the second hearing, on the 4th *February 1727*, the proceedings in the Spiritual Court in 1704 — *Samuel Luscombe's* account — the defendant's answer — the sentence in the said court — and the deposition of one of the witnesses, are entered as having been read. But it seems that this evidence did not satisfactorily support the statements in the plea of *Samuel Luscombe*, as the Court directed an issue to try whether the 60*l.* given by the will of the said *George Luscombe* to the plaintiff, and the 40*l.* given by the said will to the said *Samuel Luscombe* the plaintiff's brother, or either of those two sums, or any and what part thereof, was paid or accounted for by the said defendant *Samuel Luscombe*, to the said *Samuel Luscombe* the plaintiff's brother. (d) And as to the question whether the plaintiff should be admitted to a redemption of the said mortgaged premises, his Honor declared that he would take time to consider thereof before he delivered his opinion thereon.

(a) *Reg. Lib. B. 1727. fo. 373.*


(b) *Reg. Lib. B. 1728. fo. 88.*

(c) *Reg. Lib. B. 1728. fo. 125.*

(d) *Reg. Lib. B. 1728. fo. 352.* In matters in which the Ecclesiastical Courts possess exclusive jurisdiction, their decisions are conclusive when the same question comes collaterally before another court. *Meadows v. Kingston, Amb. 756.* As to their effect when there is a concurrent jurisdiction, see *Bissett v. Astell, 2 Vern. 47.* *Bouchier v. Taylor, 7 Bro. P. C. 414.* *Vanbordugh v. Cock, 1 Ch. Ca. 200.* *Bland v. Elliott, Finch. 67.* *Parker v. Dea, ib. 123.* *Digby v. Cornwallis, 3 Ch. Rep. 40.*

There are two subsequent orders in the cause; one for the delivery of the plaintiff's papers by her solicitor (a), and the other to enlarge the time for trying the issue (b); no mention is made in either of them of the question relating to the equity of redemption. The Register's book has been searched for several subsequent years, without discovering any traces of the cause; the name may have been changed by the death or marriage of the plaintiff, or she may have discontinued the prosecution of it; she sued in *forma pauperis*. (c)

It is said in the report in *Mosely*, that the equity of redemption was afterwards decreed to the younger brother; but this is probably a mistake, as he and the mortgagee were co-defendants in the suit. It is said *arguendo* in 1 *Atk.* 604., that nothing was determined, the *Master of the Rolls* being doubtful. Perhaps what fell from him was considered equivalent to a decision, and deterred the plaintiff from agitating the question again. (d)

1820.

 Marquis
 CHOLMON-
 DELEY
 v.
 Lord
 CLINTON.
 ———
Append.

APPENDIX, No. IV.

LANSDOWNE v. LANSDOWNE.

(*Mosely*, 364. *Reg. Lib.* B. 1729. fo. 464.)

Mary Lansdowne having four sons, *Richard*, *John*, *Thomas*, and *William*, by settlement limited to each of them in fee, a part of her real estates, after her death. The plaintiff was the son and heir of *Richard*. *John* died without issue, having devised his share to *Thomas*, and *Thomas* afterwards died without issue and intestate. On this a question arose between the plaintiff and *William*, as to the right of succession to *Thomas*; after consulting with one *Hughes*, they agreed to divide the lands between them, and in pursuance of the agreement they executed first a bond,

(a) *Reg. Lib.* B. 1729. fo. 166.

(b) *Reg. Lib.* B. 1729. fo. 378.

(c) *Reg. Lib.* B. 1722. fo. 103.

(d) See also what is said by Lord *Hardwicke* respecting this case in *Casburne v. Inglis*, *supra*, 200.

and

1820.

Marquis
CHOLMON-

DELEY

v.

Lord
CLINTON.—
Append,

and afterwards conveyances of the shares fixed on for each.

The plaintiff sought to be relieved against these instruments, alleging by his bill that he had been surprised and imposed upon by *Hughes* and *William Lansdowne*. *Hughes* was made a defendant to the bill; the other defendant was the infant son and heir of *William*, who had died before the commencement of the suit. *Hughes*, in his answer, admitted that he had given his opinion that *William*, was the heir at law of *Thomas*, "being," as he said, "misled herein by a book which this defendant then had with him, called *The Clerk's Remembrancer*." He recommended them to take further advice, which they at first intended to do, but the plaintiff afterwards voluntarily told him, "That if his cousin *William* would, he would agree to share the land between them, let it be whose right it would, and thereby prevent all disputes and lawsuits."

The decree declared, that it appeared that the bond and indentures were obtained by a mistake, and misrepresentation of the law, and ordered them to be given up to be cancelled. The bill was dismissed, as against *Hughes*, without costs.

ERRATUM.

P. 133, line 18. for "of" read "and."

END OF THE FIRST PART.

REPORTS

OF

CASES

ARGUED & DETERMINED

IN THE

HIGH COURT OF CHANCERY,

Commencing in the Sittings before

EASTER TERM,

1 GEO. IV. 1820.

PENTICOST v. LEY.

Rolls.
1820.
May, 1. 8.

(Before the Lord Chief Baron, and Masters Courtenay
and Dowdeswell, for the Master of the Rolls.)

ALICIA DONKIN, by her will, dated the 18th November, 1802, amongst other things, gave to *William Ley*, son of *Halse Ley* of Totnes, in the county of Devon, 700*l.*, part of the sum of 1000*l.* long annuities then standing in her name, or in trust for her; she also gave to *Halse Ley*, another son of the said *Halse Ley*, the sum of 200*l.*, other part of her capital or share in the long annuities; and she also gave to *Mary Penticost*, the daughter of *Sarah Penticost*, the sum of 100*l.*, the residue of the said sum of 1000*l.* long annuities. She appointed *Jacob Ley* her executor, and gave to him the residue of her real and personal estate.

Bequest of 1000*l.* long annuities "now standing in my name or in trust for me." At the date of the will, the testatrix had no long annuities, but had 1000*l.* 3 per cent. reduced annuities. Held that that sum passed by bequest.

VOL. II.

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The

1820.
 PENTICOST
 v.
 LEY.

The testatrix afterwards, by a codicil, revoked the bequest to *William Ley*, and divided the 700*l.* given to him by the will, into parts as follows, *viz.* : — 300*l.* to his brother, *Halse Ley* ; 200*l.* to his brother, *Thomas Ley* ; 100*l.* to his sister, *Elizabeth Harris* ; and the remaining 100*l.*, on the decease of *William Ley*'s wife, to be paid to him. — The testatrix died in June, 1812.

The bill was filed by the legatees against the executor, for payment of their legacies. By the answer of the defendant it appeared, that the testatrix, at the time of making her will, was entitled to a sum of 1000*l.* 3 *per cent.* reduced annuities, and a sum of 3738*l.* 13*s.* 10*d.* 3 *per cent.* consolidated annuities, standing in the names of trustees for her. These sums had been afterwards, by an order of the Court, transferred into the name of the Accountant General, and remained standing in his name until the death of the testatrix ; they were subsequently transferred to her executor. On enquiry at the Bank, it appeared that the testatrix had no long annuities standing in her name at the time of her death, and no information could be obtained as to any long annuities having ever belonged to her. The question was, whether the Plaintiffs, the legatees of the 1000*l.* long annuities, were entitled to any thing, and what, in respect of the bequests to them ?

Mr. Heald and *Mr. Pepys*, for the Plaintiff.

From the admissions in the answer it may be inferred, that at the date of her will the testatrix was not possessed of any long annuities, and that she must therefore have been under some mistake in making a bequest of property which she had not. For the purpose of proving and of explaining a mistake of this nature we may have recourse to considerations
 derived

derived from the state of her property at the time; *Fonnercau v. Poyntz* (a), *Finch v. Inglis* (b), and we find that there was a sum of 1000*l.* 8 *per cent.* reduced annuities then standing in trust for her: this explains the nature of the mistake; she meant to bequeath the sum which she really had, but mentioned it by a wrong denomination. In *Dobson v. Waterman* (c), the testator gave 700*l.* 3 *per cent.* consols, which he said was then standing in his name; it appeared that, in fact, he had no consols, but he had a sum of 1800*l.* 3 *per cent.* *South Sea* annuities. Lord Kenyon considered this sufficient to warrant him in concluding that the name of the one species of stock had been substituted for the other, and directed the legacy to be paid by a transfer of 700*l.* of the *South Sea* annuities. In the same manner, in *Finch v. Inglis*, legacies of bank stock were paid in 3 *per cent.* consols, the testator having no stock except of the latter kind; and though the decree there was made by consent, yet Lord Thurlow's expressions show that that was not from any doubt of the principle, but only to avoid the expence of enquiries. The present case is stronger than either of them; as the sum which the testatrix possessed in the one fund, is exactly the same in amount as that which she has bequeathed in the other.

1829.
Plaintiff
v.
Lxx.

In *Selwood v. Mildmay*, 3 *Ves.* 306, the testator gave a legacy of a sum in the 4 *per cent.* annuities, in terms that in general would have made it specific; it appeared that he had none, and the Court ordered the sum to be made up out of the general personal estate. If the principle of that case be adopted, the Plaintiffs will be entitled to 1000*l.* *per annum*, long annuities, or as much as the property of the testatrix may be able to furnish towards that sum. There may also be some doubt here whether the bequest is specific; for though the terms in which it is

(a) 1 *Bro. C. C.* 472. (b) 3 *Bro. C. C.* 480. (c) 5 *Ves.* 306.

1820.
 PENTICOST
 v.
 LEY.

given, if taken alone, would clearly make it so, yet there is a peculiarity in all the legacies, including this, being charged upon the real estate, which may be considered to controul the former expressions.

Mr. Horne and *Mr. Boteler*, for the Defendant the executor, contended that the Court was confined in construing the will to what appeared on the face of it; and that even if it could have recourse to extrinsic considerations, there was not sufficient ground for presuming a mistake of the denomination of the stock. Being specific legacies, the subject of which was not to be found, they must fail.

May 8.

The Lord Chief Baron, observing that it was not distinctly admitted in the answer, that the testatrix had no long annuities at the date of her will, enquired if the Defendant was willing to admit it, or would prefer an enquiry. The Defendant's counsel consented to admit the fact.

THE LORD CHIEF BARON, (after stating the will.)

The question in this case is, whether the Plaintiff's take any thing, and what, by the bequests to them? If the testatrix had had any long annuities at the time of making her will, and had afterwards disposed of them, there might have been a question of revocation or ademption; but we now may understand that she had none; and that being the case, I take it for granted, that she could not really have intended to bequeath long annuities, specifically so called. But it is clear she meant to give something, and unless we can travel from what she has said to something else, we must entirely disappoint that intention.

It being clear that she intended to give something,

we

we must try, as well as we can, to make out what it was. Now she had, at the date of her will, a sum of 1000*l.* 3 *per cent.* reduced annuities; and having nothing to answer the description so nearly as that sum, and it being clearly a mistake, it seems to me that we are obliged to consider, that when she said 1000*l.* long annuities, she meant this 1000*l.* 3 *per cent.* reduced annuities.

1820.
PENTECOST
2.
LEY

We are fortified in this conclusion, and, as it were, driven to it, by that case of *Dobson v. Waterman*. One of my learned friends has searched the Register's Book (a), and finds that it is correctly stated. That case decides this. I can see no rational distinction between them. There is also another case which has been pointed out by one of my learned friends, *Door v. Geary* (b), decided by Lord *Hardwicke*, and which establishes the same principle.

We are therefore all of opinion, that there must be a declaration of the Court, that these legacies were intended to be given out of the sum of 1000*l.* 3 *per cents.* which the testatrix then had standing in trust for her.

(a) *Reg. Lib. A.* 1786. fo. 268.

(b) 1 *Ves. sen.* 255. *Reg. Lib. B.* 1748. fo. 435.

BLAYDES v. CALVERT.

Oct. 25.

THE bill stated, that the Plaintiff had been engaged in some joint speculations with Messrs. *Staniforth* and *Blunt*; that in *January*, 1819, the latter stopped payment, upon which the plaintiff filed a bill against them, and obtained an injunction to restrain them from receiving

Writ of *ne exeat regno* refused, on a bill to enforce an agreement to give a bill of exchange to secure the debt of a third person.

1820.

BLAYDES

CALVERT.

ing the proceeds of those speculations, and a receiver was appointed. Messrs. *Staniforth* and *Blunt* afterwards executed a trust-deed for the benefit of their creditors; and they and their friends being desirous that the Plaintiff's claim should be settled, an agreement was entered into, by which the Plaintiff was to give up his right to the proceeds of their joint-speculations, and all proceedings were to be stopped; the Defendant was to indemnify the Plaintiff against any claims that might be made on him in respect of those speculations, and to guarantee to him the sum of 2700*l.*; to provide for the payment of which it was agreed, that the Plaintiff should prove certain debts against the estate of one *Stevenson*, a bankrupt, and also against the estate of Messrs. *Staniforth* and *Blunt*, and receive the dividends upon them; but if, when the first dividend of the estate of Messrs. *Staniforth* and *Blunt* should be declared, the dividends on the Plaintiff's proofs should not amount to 2700*l.*, the Defendant was to give the Plaintiff a satisfactory bill for the difference, payable at twelve months, with interest. A written memorandum of this agreement was drawn up.

The bill stated, that a dividend had been declared of the estate of Messrs. *Staniforth* and *Blunt*; but that the amount of the dividends on the Plaintiff's proofs was only 109*l.* 17*s.* 1*d.*; that the Defendant was about to go abroad; and prayed that he might be compelled to perform the agreement, and either to pay the difference between the 2700*l.* and the amount of the dividends, or to give the plaintiff a bill for it, and to indemnify him from the claims arising out of the joint transactions; it also prayed, that the accounts might, if necessary, be taken; and a writ of *ne exeat regno*.

The bill being supported by affidavit, an application was
made

made to the Lord Chancellor, in the vacation, for the writ of *ne exeat regno*, when his Lordship wrote as follows:—

1820.
BLAYDES
v.
CALVERT.

“ It does not occur to me upon recollection, and at present I cannot find time to look into books, that the writ of *ne exeat regno* has been granted in such a case as the present. The counsel, therefore, who advise the application must be so good as to communicate the grounds and authorities upon which they suppose that the writ is grantable in such a case, and for the purpose, not of securing a mere equitable debt now payable, but to compel the giving a bill.”

Mr. Cooper, in consequence, attended his Lordship on the following day, and submitted that a Court of equity would decree the specific performance of a contract like the present, it being incomplete, and leaving something to be done before the Plaintiff could resort to his remedy at law; that the Plaintiff's demand was measured by the difference between the £700*l.* and the amount of the dividends; it was therefore certain, and, considered as damages for the breach of the agreement, ought to be immediately paid; but that the defendant could not be held to bail at law.

The Lord Chancellor refused the writ, and gave his written opinion in the following terms:—

“ The granting this writ, when there is a balance due upon account, although the party may be held to bail at law, has always been considered a case of exception to a general rule. It is also a case where there is a present money demand. It is taken for granted here, that the party cannot be held to bail at law. That is not a point for my consideration, — but, after looking into the books, my present opinion is, that the party cannot be held to what is sometimes called equitable
P 4 “ bail;

1820.

BLAYDES

v.

CALVERT.

"bail; in other words, I do not find authority to warrant granting the writ in such a case as this, and there seems to be authority against it." (a)

(a) See *Raynes v. Wise*, 3 Mer. 472

ROLLS.

Nov. 2. 1820

WORRALL v. JOHNSON.

Whether a solicitor's lien, for his costs on a fund in Court is general, or is confined to the costs of the particular suit, *Quere.* Solicitor having in his possession the instrument on which his client's right to the fund rests, he has a general lien on the fund.

EDWARD ALLEN being indebted to the Plaintiffs, by deed assigned to them as a security, his share in the capital and stock of a partnership in which he was engaged with two of the defendants. He afterwards became bankrupt; upon which the suit was instituted against his partner and his assignees, for the recovery of the property assigned; and a balance admitted to be due to *Allen* from his partners was, on motion, paid into Court and invested in the purchase of 2330*l.* 3 per cent. consols. The suit was afterwards compromised, and one of the terms agreed upon was that the Plaintiffs were to receive this fund. Before a transfer took place, the Plaintiffs became bankrupts, and their solicitors then presented a petition for the purpose of establishing their lien on the 2330*l.* consols, for the payment of their bills for costs incurred in the suit, and for the costs of other professional business in which they had been engaged for the Plaintiffs. Their claim was referred to the Master, who reported in favour of it. By the report it appeared that the deed of assignment from *Allen* to the Plaintiffs had been deposited with the solicitors, who had also in their hands the memorandum of the agreement between the Plaintiffs and Defendants. They stated by their affidavit that they had expended considerable sums of money in this suit and in other suits and matters on behalf of the Plaintiffs,

Edman 14th Nov 6
557

Bozon 24th Nov 6
Bolland 355

Hall 44th Nov
Lanes 219

Plaintiffs, and that they had forborne to enforce payment of their bills, upon the faith of, and trusting to the result of this suit, and relying on the fund in Court, and their lien on the deed of assignment, and the agreement.

1820.
WORRALL
v.
JOHNSON.

A petition was now presented to confirm the report, and a counter petition by the assignees of the Plaintiffs praying that it might be reviewed, and that the lien might be declared to extend only to the costs of the suit.

Mr. Wetherell and Mr. Wilbraham, for the Plaintiffs' assignees.

When a solicitor has in his custody documents belonging to his client, he is allowed a general lien on them for all bills of costs that may be due to him; and the question here is, whether he has the same lien on a fund in Court. The distinction between the cases is, that the solicitor having manual possession of the deeds, the client cannot procure them, except by an order made upon him; whereas the fund is in the possession of the Court and may be reached without the assistance of the solicitor. We should admit that if the fund by any means came into his possession, he would be entitled to retain the amount of his bills generally; till then he has only a constructive lien given him by the Court, which has never extended it beyond the particular suit. The principle of this lien, stated by Lord Kenyon in *Read v. Dupper* (a), "namely, that the party should not run away with the fruits of the cause without satisfying the legal demands of his attorney, by whose industry, and, in many instances, at whose expence these fruits are obtained," is confined to the industry and expence devoted to the recovery of the fund, not extending to other business. Yet the lien is carried further at law than in

(a) 6 T. R. 561.

1822.
 Warratt
 a.
 Janssen.

courts of equity. In the latter, the lien of the solicitor is subject to all the equities that may attach on the fund in his client's hands. (a) If a Defendant has a claim against the Plaintiff, that is to be satisfied in preference to the solicitor's bill. It is the same in the Common Pleas. (b) But in the King's Bench the solicitor's lien subsists independently of any equities or of other actions. If the Plaintiff has obtained judgment, the Defendant cannot make a set off without paying the bill of the Plaintiff's attorney, *Mitchell v. Oldfield*. (c)

In *Turwin v. Gibson* (d), Lord Hardwicke held, that when the plaintiff died, the solicitor's lien on the fund recovered was to be preferred to that of the bond-creditors; this might often prove very injurious if the lien was to be extended to the whole debt. In *Middleton v. Hill* (e) the defendant, in setting off a judgment, had to satisfy the lien of the plaintiff's attorney; he objected to a part of the bill which consisted of the costs of a writ of error; but the Court held, that they were costs in the cause, and therefore were included. It is to be inferred, that the lien was not considered to extend beyond the costs in the cause.

Mr. Horne and Mr. Romilly, for the solicitors.

In *Barnesley v. Powell* (f), a solicitor who had been engaged for a lunatic in various suits, was declared to have a lien on the lunatic's estate for his bills generally. The solicitor's lien on the fund recovered is established

(a) *Taylor v. Popham*, 15 Ves. 73. *Ex parte Rhodes*, id. 539.

(b) *Vid. Schoole v. Noble*, 1 Hen. Bl. 23. *Vaughan v. Davies*, 2 Hen. Bl. 440. *Barker v. Braham*, 3 Wils. 396. 2 Bl. 869. *Boherts v. Mackout*, 2 Bl. 827. *Hall v. Ody*, 2 Bos. & Pul. 28. *Emmet v. Darley*, 1 N. R. 22. *Figes v. Adams*, 4 Taunt. 632.

(c) 4 T. R. 123.

(e) 1 M. & S. 240.

(d) 3 Atk. 720.

(f) *Amb.* 103.

by

by many authorities. *Welsh v. Hole* (a), *Ex parte Price* (b), *Turwin v. Gibson* (c), *Mitchell v. Oldfield*. (d) The rule is laid down in general terms, without any qualification to limit it to the costs of the suit. In the last of these cases, Lord *Kenyon* puts the lien on the fund and the lien on the papers on the same footing. They must, therefore, be co-extensive. In *Middletan v. Hill* (e) it was not necessary to decide this point, and that was a case between the solicitor and the adverse party; but here it is with the clients themselves. The fund is sometimes paid to the attorney in the first instance, and he may then retain generally.

1839.
Worsall
v.
Jennens.

But if this ground fails, it is then to be considered, that the fund in this cause is not like a judgment recovered in a personal action; for it is only obtained by means of the deed, which is in our possession. This deed is the foundation of the Plaintiff's right, and without producing it they can never procure the fund to be transferred to them. We may, it is admitted, retain the deed till payment of our whole demand, and the possession of it must have the same right over the fund. They also cited *Ormerod v. Tate* (f), *Ex parte Rhodes* (g), and *Griffin v. Eyles*. (h)

Mr. *Wilbraham*, in reply, said, that the Plaintiffs would be able to procure a transfer of the fund without the deed. But even if it were otherwise, the possession of the deed gives no direct claim upon the fund, and cannot authorise an application on the part of the solicitor; it can only enable him to reach it indirectly, by obstructing our attempts to have it transferred. The question, therefore, cannot arise until we apply for the purpose.

(a) *Dougl.* 238.

(c) 3 *Atk.* 720.

(e) 1 *M & S.* 240.

(g) 15 *Ves.* 539.

(b) 2 *Ves. sen.* 407.

(d) 4 *T. R.* 123.

(f) 1 *East*, 463.

(h) 1 *Ellen. Bl.* 122.

Mr.

1820.

WORRALL

v.

JOHNSON.

Mr. G. Wilson (*amicus curiæ*) mentioned, that His Honour the Vice Chancellor had, in a late case, decided that a solicitor's lien on the fund recovered extended only to the costs of the particular suit. (*a*)

The MASTER of the ROLLS.

If this case depended on the general question, to what extent a fund in Court is liable to the solicitor's demands, I should pause before I decided; but it is to be considered whether this is not a special case, standing on grounds independent of the general principles that have been discussed.

There are two kinds of lien that a solicitor has for his bill of costs; one on the funds recovered, and the other on the papers in his hands. If there be no fund and no cause, still the client cannot get back the papers without paying what is due, not only in respect of that business for which the papers were used, but for other business also. This lien, however, does not extend to general debts, but only to what is due to him in the character of attorney. That he has a right to retain, and it is in consequence the general practice for the client when he applies for an order for the delivery of his papers, to submit to pay the bills of costs generally.

Solicitor's lien does not extend to debts that are not due to him in his professional character.

In this case, the mortgage deed on which the money recovered was due was put into the hands of the solicitor. Suppose there had been no suit; then the money could not have been received without giving up the deed; for the mortgagor would not have paid it without having the deed back. In that case the attorney would get all that was due to him; for it is allowed that his lien on the deed is general. Whether the money is paid with or without a suit can make no difference, the attorney having, on the faith of the instrument, and of the money

(a) *Lann v. Church*, 4 *Mad.* 391.

due on it, engaged in various business, and forborne proceedings to enforce payment. The circumstance of the suit being carried on to compromise, to a judgment, or a decree, cannot deprive him of the lien that he has by virtue of the possession of the deed. If the Court were to decide that it did, it would give the attorney an interest to be negligent in the conduct of the cause. While the deed remained in his hands he would have a lien for his whole demand; but his industry, employed in the service of his client, would abridge this general right. His final success cannot be allowed to operate to his prejudice.

1820.
WORRALL
v.
JOHNSON.

It is of no consequence that there has been a compromise here. The fund cannot be transferred without an application to the Court; and the other party would then object, unless the deed be given back to them; and it cannot be got at except from the solicitor. The Plaintiff's assignees can therefore never succeed without applying for the possession of it. The same question would therefore ultimately arise in another shape. The rights of the parties are not altered by the money being paid into Court; the accident of where it may be is immaterial, so long as it is *in transitu*.

The principle I go on is, that the papers which give to the solicitor this right must be considered as giving the same right, after the suit has been prosecuted with success, as when they were antecedently in his hands. To decide otherwise would be extremely mischievous, in discouraging a solicitor's exertions for his client. This does not involve the general question. The money here is the fruit of this deed, and it can only be recovered through the medium of the deed. I therefore think the decision of the Master right.

1850.

Nov. 22.

Ex parte HOPLEY, in the matter of ILLINGWORTH.

A creditor having paid himself part of his debt by the sale of goods taken under an execution, the validity of which was disputed, admitted (after the choice of assignees) to prove for the difference. Petition to stay the certificate, on the ground of the rejection of a debt, having been served on the bankrupt only one day before the petition day, dismissed with costs.

THE petitioners were creditors of the bankrupt to the amount of 10,566*l.* 13*s.* 4*d.* Their debt was secured in part, by a bond in the penalty of 1200*l.*, and also by a judgment for 15,000*l.*, upon which they took out execution on the 8*d* May, 1820, and seized the bankrupt's stock in trade, and other effects. The commission issued afterwards, on the 18*th* of the same month. The petitioners applied to the Court to have a value set upon the goods taken in execution, and for leave to prove for the difference between the amount of their debt and the value, to enable them to vote in the choice of assignees; but the validity of the execution being in dispute, this application was refused. (a) On the 1*st* and 2*d* of June, the goods seized were sold by auction, and produced to the petitioners the sum of 2462*l.* 11*s.* 6*d.* reducing their debt to 8104*l.* 4*s.* 5*d.* At the third meeting, on the 1*st* July, they tendered a proof to this amount, which was rejected by the commissioners, on the ground that the assignees had brought an action against the sheriff, to recover the goods, and to try the validity of the execution, till the trial of which action they thought the proof could not be received. The petitioners prayed that they might be admitted to prove. It was stated at the bar, that the petitioners had given notice to dispute the commission at the trial.

Mr. Hart and Mr. Rose, for the petitioners.

Mr. Heald and Mr. Montagu, for the assignees.

(a) *Ante*, vol. i. 425.

The

The LORD CHANCELLOR.

1880.
Ex parte
Hemst.

Of late, when a creditor has property of the bankrupt in his hands, as a pledge, and his right to retain it, is undisputed; the court has allowed him, before the choice of assignees, to prove his debt, deducting the value of the pledge, and imposing such terms, that justice may be done to the estate. But this has never yet been done, as far as I know, where the property has been taken under an execution, which is controverted: the right to retain it is not admitted; and there are many cases where I think such an order would be inexpedient, where the right is contested, and the property is not turned into money. But I cannot see why the proof of the difference should not be permitted here; though there may be cases when it would be necessary to put the creditor on some terms. It is said, here, that the petitioners have given notice, under *Sir Samuel Romilly's* act, that they will, at the trial, require the proof of the validity of the commission; and this they have a right to do, for their claim to retain the fruits of the execution must depend on the date of the act of bankruptcy. If it was before the execution, the execution cannot stand; and therefore I think they are entitled to call upon the assignees first to prove the act of bankruptcy. On the whole, I cannot see any objection to the proof being received.

A petition by the same parties, to stay the certificate, *Nov. 24.* came on at the same time; but, upon a suggestion that it had not been regularly served, it stood over till this day, that the affidavit of service might be produced. It appeared that the petition was answered on the 30th *October*, for the 4th *November*; but the solicitor not being able to find the bankrupt, it was not served till the 3d.

Mr. Heald and *Mr. Montagu* insisted, that, upon the rule

1820.

Ex parte
HOPLEY.

rule established by the former cases (a), the petition ought to be dismissed with costs.

Mr. *Rose*, on the other side, argued that there was no positive rule fixing what time previous to the petition-day the service ought to be; it must be discretionary; and, as this petition proceeded on the ground of the rejection of a debt that would have influenced the certificate, and not upon any misconduct imputed to the bankrupt, there was not the same necessity for long notice. With respect to the costs, he contended, that the general rule alluded to applied only when the petition was dismissed upon the merits, and the costs were not given when the dismissal was on a point of form, unless when prayed by the petition.

The LORD CHANCELLOR.

I apprehend, that, as to all petitions, the service should be two days before the petition day; here it was a day too late. If they could not find the bankrupt they might have applied for an order to make service at his last place of abode good service. I do not see where it is to stop. If one day before is sufficient, it will next be said that an hour before will do.

On a former occasion, when it was objected that the bankrupt appeared in person, it struck me that it was pressing him too hard; and I thought he might insist on the irregularity, notwithstanding his appearance.

I really think the best rule is to say, that parties must come in time, and serve their petition in time; and

(a) 1 *Rose*, 67. n. *Ex parte the Bank of Scotland*, 1 *V. & B.* 5. 1 *Rose* 375. *Ex parte Gardner*, 1 *V. & B.* 45. 1 *Rose* 377. *Ex parte Kendall*, 1 *V. & B.* 543. 2 *Rose*, 115. *Ex parte Coulbourn*, *ib.* 187. *Ex parte Harford*, 1 *Buck.* 38. *Ex parte Groome*, *ib.* 39.

that

that, if they do not, the bankrupt being, in the contemplation of the law, a person without any property, they must pay the costs.

Petition dismissed with costs.

1820.

Ex parte
HOLLEY.

Wuxon v. Wile J D & Warren 107 ROLLS.

CHRISTOPHERS v. SPARKE.

Nov. 21. 23.

THE bill stated, that in the year 1794, *Robert Sparke*, *G. Y. Sparke*, and *E. P. Banfill*, on the dissolution of a partnership that had previously existed between them, agreed to refer some matters in difference to the arbitration of the Plaintiff *J. Christophers*, *W. Newman*, and *P. Dunsterville*, and that they bound themselves to submit to the award of the arbitrators, or any two of them. An award was made in January, 1795, by *Christophers* and *Newman*, deciding, that a balance of 1852*l.* 10*s.* 5*d.* was due from the two *Sparkes* to *Banfill*. The bill then stated, that the two *Sparkes* were unable to pay the sum awarded due; but that, being entitled, as joint-tenants on fee-simple, to certain plantations and premises in the island of *Newfoundland*, *G. Y. Sparke* agreed to secure his moiety of the debt upon his interest in the plantations. He accordingly gave a bond to *Banfill* for the sum of 926*l.* 5*s.* 2*d.*, and interest; and, by indentures of lease and release of the 1*st* and 2*d* May, 1795, conveyed to him, in fee, his moiety of the premises, upon trust to sell the same, with or without the consent of the said *G. Y. Sparke*, his heirs, or assigns; and after retaining the expenses of the sale out of the purchase-money, and out of the rents and profits to accrue in the mean time, then to pay off and discharge the sum

Bill by mortgagee for a sale under a trust for that purpose in the mortgage-deed, dismissed upon doubtful evidence of title, and possession for twenty years without payment of interest, demand, or acknowledgement. Satisfaction of a mortgage to be presumed after twenty years possession by the mortgagor, without payment of interest, demand, or acknowledgement. *Scoble*. Where a debt is claimed by the plaintiff and is disputed by the defendant, who admits that it has not been paid, lapse of time against the original

cannot raise a presumption of payment, but may afford a presumption against the original existence of the debt.

1820.

 CHRISTOPHERS
 v.
 SPARKE.

of 226*l.* 5*s.* 2*d.*, according to the condition of the bond, and to pay the surplus to G. Y. Sparke. It was provided, that the conveyance should not prejudice the right of *Banfill* to call upon *Robert Sparke* to fulfil the award as to payment of the money thereby awarded, or a moiety, or any part thereof; but if *Robert Sparke*, his heirs, executors, administrators, or assigns, should discharge the whole of the debt, or more than a moiety, then *Banfill* was to release the premises conveyed to him, from the whole, or so much, exceeding a moiety, as should be thus discharged.

The bill then stated, that *Banfill* never received any part of the 185*l.* 10*s.* 5*d.*, and never entered into the possession or the receipt of the rents and profits of the premises conveyed to him, not having taken any steps to enforce his security, from a belief that the premises were of small value, and from the two *Sparkes* being, up to the time of their deaths, in embarrassed circumstances as to their personal estate and property. *Banfill* died in the year 1802, having, by will, given all his real and personal estate to *Christophers* and *Newman*, whom he appointed executors upon certain trusts for his wife and children; and having, by a codicil, given to his wife his interest in the premises above mentioned, together with all monies due to him from *Robert Sparke*, by virtue of the award. Mrs. *Banfill* survived her husband, and by her will gave the residue of her goods, chattels, and effects to her children, to be equally divided between them. She died in 1810. G. Y. Sparke and *Robert Sparke* both died intestate, leaving the defendant, the son of the latter, their heir-at-law. The bill was filed in November, 1812, by the executors of *Banfill*, and his wife, and their children; alleging, in addition to the circumstances stated above, that they were unable to discover whether G. Y. Sparke had left any personal estate, or whether there was any personal representative

representative to him, and that the defendant was in possession or receipt of the rents and profits of the premises comprised in the indentures of May, 1798, claiming to be entitled to them as heir-at-law to his father and uncle. It prayed an execution of the trusts of these indentures by a sale of a moiety of the premises:

1820.
CHRISTOPHER
J.
SPARKE.

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The Defendant, by his answer, said he had heard and believed that G. Y. Sparke and Robert Sparke were, under the will of their father, entitled as joint tenants to the premises in question, but that, on the 10th of March, 1788, the former, in consideration of 950*l.* released or agreed to release to the latter his interest in those premises and in all other the estate and effects of their father; from that time till his death, in 1812, Robert Sparke, or those claiming under him, were in uninterrupted possession, being upwards of twenty-four years. He believed that his father, R. Sparke, had, by indenture dated the 2d of August, 1808, mortgaged the premises to one J. Leigh for a term of 5000 years, to secure a loan of 700*l.* The Defendant had, since his father's death, received 340*l.*, part of the rents and profits, the rest having been received by Leigh. The Defendant said he believed that no debt was really due from the two Sparkes to Bunfill, and that if a certain account book in the possession of the latter, and which he alleged to have been accidentally destroyed, had been produced before the arbitrators, it would have appeared that the balance was against him. The third arbitrator, Dunsterwille, had refused to join in the award, in consequence of the non-production of this book. He believed that no part of the 1852*l.* 10*s.* 5*d.* had ever been paid, Robert Sparke having always refused to comply with the award. He said that no steps had been taken to enforce it, during the life time of Robert Sparke, or till the filing of the bill, upwards of twenty years after the award, and he believed

1820.

CHRISTOPHERS
v.
SPARKE.

that this conduct on the part of *Banfill* arose from a consciousness that no debt was due to him as stated in the award, but that there was really a balance due from him to the two *Sparkes*, which *Robert Sparke* was fully prepared to prove; and that *Banfill*, therefore, and from a fear of having the accounts fully investigated in a court of equity, allowed matters to rest quietly without attempting to compel the performance of the award. He said that *Robert Sparke* was possessed of considerable personal property, but admitted that *G. Y. Sparke* was in embarrassed circumstances.

On the part of the Plaintiffs the award was produced. The death of the attesting witness and his hand-writing in the attestation was proved. The conveyance of *May*, 1795, was also produced. It appeared, on inspection, to contain a recital that *G. Y. Sparke* had, in the year 1790, conveyed his moiety of the estate to trustees upon certain trusts, which it did not set out. On the part of the Defendant, evidence was read of declarations made by *G. Y. Sparke* in his life time that he had conveyed away to his brother all his interest in the property at *Newfoundland*: it was also proved, that from the year 1788, the rents had been received by *Robert Sparke* and *Leigh*, and by one *Furneaux*, to whom it was said that *Robert Sparke* had mortgaged the premises. There was also some parol evidence of the mortgage mentioned in the answer to have been made to *Leigh*, and of a conveyance of the same premises, made in 1790, by the two *Sparkes*, upon trust to sell for securing a debt that was said to have been afterwards paid off by *Robert Sparke*; but none of these instruments were produced.

Mr. Heald and *Mr. Abercrombie* for the Plaintiffs.

Mr. Wetherell and *Mr. Blake* for the Defendant.

This bill seeks to substantiate a mortgage after a possession

session of more than twenty years without payment of interest, acknowledgment, or demand. There is nothing to repel the presumption of payment, which is raised by length of time. The mortgage contained a trust to sell, but still the case cannot be stated higher than that of a bill of foreclosure which, after twenty years without demand, and without payment of interest, cannot be sustained, *Trash v. White* (a); for, notwithstanding what is said in *Toplis v. Baker* (b), the principle of presumption is considered to apply as well to mortgages as to bonds. (c)

1820.
CHRISTOPHER
v.
SPARKE.

The Defendant claims as heir to his father, and insists upon the Plaintiffs never having had any title; the evidence also renders it probable that, at the date of the conveyance, *G. Y. Sparke* had no interest in the premises. Here, also, the length of time operates in favour of the Defendant, coming in aid of the other circumstances, to afford a presumption that the debt now demanded was never really due, or that the mortgage was good for nothing. If the Plaintiffs had any title, how is the delay in the commencement of this suit to be accounted for? Was it possible that no steps should be taken to enforce the demand if there was a prospect of success? At this distance of time the circumstances relating to the award cannot be fairly investigated; and on the ground of laches alone the Plaintiffs should be precluded from relief. The length of time being relied on not as a bar, but as raising a presumption, it was not necessary formally to insist on it.

The suit is unnecessary, as they might, if their security is good, have taken possession, or sold the estate without the assistance of the court. The personal representative

(a) 3 Bro. C. C. 289. (b) 2 Cox. 118.

(c) See *Blewitt v. Thomas*, 2 Ves. jun. 669. *Meade v. The Earl of Brandon*, 2 Dow. Park. Cus. 368.

1899.
 CAMPBELL
 v.
 SPARKE.

of G. Y. Sparks and of Robert Sparke, who, according to the statement, is jointly responsible for the debt, as well as Leigh, the mortgagee, ought to have been parties.

Mr. Mead, in reply.

The Defendant admits that the sum in question has not been paid; an admission which shuts the door to all presumption of non-payment, if such presumption could otherwise have prevailed. Nor is the length of time insisted on in the answer; without which the Defendant cannot have the benefit of that defence. The Plaintiffs' case rests upon the conveyance, which is alone sufficient, in the absence of evidence, to support the assertions in the answer.

The MASTER of the ROLLS.

It seems to me, that there are considerable difficulties in the way of the Plaintiffs; though certainly the Defendant in his answer has not brought the merits of his case before the Court quite so formally as he might have done; but before I decide I shall read the pleadings.

The first question is with respect to the parties. As I understand the case, there was a joint debt due from the two Sparks, under an award, and being unable to pay it, one of them gave security for his moiety of the debt, by a conveyance, in May 1795, of a moiety of these plantations in Newfoundland. On the other side it is said, that he had at the time no interest in the premises, except subject to an antecedent conveyance to his brother, and that his brother made a mortgage to Leigh, in proof of which, it appears that the profits have been accounted for to Leigh, and two witnesses depose to repeated acknowledgements by G. Y. Sparke, that he had assigned it to his brother; and the Plaintiffs' own deed gives

gives a confirmation to this, by mentioning a previous conveyance in trust. Then, is not this sufficient to make it necessary that *Leigh* should be a party, to ascertain whether he is or not entitled, before the Court proceeds, to assist the Plaintiffs, by decreeing a sale, especially after this lapse of time; for the non-claim for twenty years is strong evidence against the Plaintiffs' claim; the possession having been conformable to an adverse title.

If this bill be proper to be entertained, there must be an account of the debt which is now due upon the award from the two *Sparks*, yet neither of their personal representatives are before the Court. How can the account be taken in their absence? They should be parties, to exonerate the real estate from this demand, unless the personalty be exhausted. If the person having the legal title, and being competent to sell, will have the assistance of the Court, all who are interested in the result of the sale must be parties, that the whole of their claims may be arranged by the decree.

With respect to the length of time, the case made by the bill is open to the observation, that it states a title acquired more than twenty years ago; and there is nothing to take it out of that period, except the allegation of applications and requests having been made; but they are neither proved or acknowledged; and the question comes to this, whether a court of equity will assist a party in enforcing a legal title where it could not be enforced at law. For, supposing the facts to be as stated, the Plaintiffs have the legal estate, and there was nothing to prevent the assertion of their right at law; but they could not now bring an ejectment, as they would be put to prove that they had had either real or constructive possession within twenty years. But there has been during that period an adverse possession, without ac-

1820.
CHANCERY
SIXTH.

The personal representative of the mortgagor is a necessary party to a bill for the execution of a trust for sale by way of mortgage

1820.
 CHRISTOPHERS
 v.
 SPARKE,

knowledge or claim. Under these circumstances they would be non-suited at law; and if so, are they to come into a court of equity, resting their case upon the same title? That cannot be contended for. If it were so, it would be the same after a greater length of time; the principle would be the same if the Plaintiffs had laid by for fifty years.

The Defendant in his answer imputes to the Plaintiffs a consciousness that nothing was due to them; their non-claim, he says, originated from this. He also states the uninterrupted possession by *Robert Sparke*, and those claiming under him, and that no steps were taken to enforce the award till the filing of the bill; and the question, therefore, is, whether it was necessary for him to put in issue any thing more? It would have been more correct to have added, that there was no demand and no acknowledgement of the Plaintiffs' right. The Plaintiffs would then have been put to prove that there was; and it would be necessary not only to show a demand, but something that would make the possession no longer adverse. It would not be enough to prove that they made a claim, if the defendant set them at defiance; they must prove that he consented to hold of them, and that his possession had therefore become theirs. I think it is clear that there is a want of parties, and I am not certain that this answer does not go far enough,

Nov. 23.

The MASTER of the ROLLS.

When this case was discussed before, I intimated my impression of some of its difficulties, and stated, that there was clearly a want of parties; but, as the counsel on both sides are desirous of having the merits disposed of,

of, that no further delay and expence may be occasioned, I will give my opinion upon it now.

1820.

CHRISTOPHERS
v.
SPARKE.

The bill seeks to carry into execution a deed, by which G. Y. Sparke conveyed a moiety of the plantations in question to a man of the name of *Banfill*, for the purpose of being sold, the produce to be appropriated to discharge the debt said to be due by the *Sparkes*, under the award which is recognized in the conveyance. The bill, after stating this, adds, that *Robert Sparke* did not give any security for his proportion of the debt, and that *Banfill* never entered into possession, not having proceeded to enforce the deed, on account of the two *Sparkes* being in embarrassed circumstances, and from a belief that the property was of small value. Seven years after this, *Banfill* dies: by his will, which is supposed to have disposed of this estate in *Newfoundland*, of which he had never had possession, or seizin, or any thing tantamount to it, he gives all his property to the two arbitrators in trust to sell: by the codicil, he gives this estate to his wife; but neither the will or codicil have been proved in the cause. The wife made a will not specifying the land in question, but containing a disposition of her goods, chattels, and effects only. Then, if she was the devisee of this estate, under her husband's will, and if it is to be considered as real estate, it would be a question whether it passed by her will, and, if not, who was her heir at law?

The Defendant, in his answer, says, that he was only six years of age at the time of the transaction; speaking from information, he admits the award to have been made, but states the circumstances attending it, and denies that any debt was really due. He says, that notwithstanding the award in his favour, *Banfill* knew that the balance was against him, and therefore did not dare

to

1850.
 Charlesworth
 v.
 Sparks.

to enforce it. The only thing he did was, to take this security from *G. Y. Sparks*, who appears to have had no interest in the estate at the time. Afterwards, though he had this conveyance from one brother, and though he had a right to proceed against both, he made no attempt. The bill assigns no reason for this neglect, except that the *Sparks* were in embarrassed circumstances as to their personal property; but that was an additional motive for enforcing this real security. It is, besides, stated, that *Robert* was in affluent circumstances; and he lived till 1812. How happened it then, if there was a joint debt, actually substantiated by an award which they dated to act upon, that it was not sought to be recovered? There was no obstacle to proceeding on the award, if they had not known that it was good for nothing; or that there was really no such debt. *Nasell* lived for three years, and after his death his personal representative, *Christopher*, himself the arbitrator, who was therefore acquainted with the whole business, lay by till both the *Sparks* are dead, not filing this bill till 1815; this is quite inexplicable, on the supposition that there was a debt due, and a valid security for it.

The bill is then filed against the Defendant, who is the real representative of *Robert* and *G. Y. Sparks*, who is in the receipt of part of the rents; the land being in the possession of *Leigh*, the mortgagee, under a title commencing in 1788, seven years before the deed under which the Plaintiffs claim, the possession since 1788 having uninterruptedly gone along with the title. On this part of the case the Defendant's answer must be read, to prove that this estate did belong to the two *Sparks*, for there is no other evidence of either of them having any interest in it. The conveyance which the Plaintiffs produce may be evidence against *G. Y. Sparks*, but it is nothing against *Robert*. Therefore, if we do not consider the answer as read, there

there is no evidence of the title. Now, the account given by the answer is, that it did belong to them, but that the share of *G. Y. Sparks* was conveyed to his brother in 1788, and that, under that conveyance, there has ever since been an uninterrupted possession. This is confirmed by the acknowledgements of *G. Y. Sparks*, that he had parted with his interest, and the adverse possession is admitted on the face of the bill. Therefore, the allegation that he was entitled, in 1785, has no ground to stand on: his conveyance could confer no title on the Plaintiffs, and the lapse of twenty years is a strong confirmation of this part of the Defendant's case.

1809:
CHANCERY
v.
STARR

It is not now the question, whether the debt has been paid; the first point is, to find whether it ever existed; and when the defence is, that it never did, the answer must, of course, say; that it never was paid. Now, there are two ways in which length of time may operate in cases like this, when it is not a positive bar by virtue of the statute, viz. by raising a presumption, either that the debt demanded never was due, or that it has been paid. It is in the former mode that it operates here. The only proof is this award; the question is, whether that created any debt; and, surely, the non-claim for twenty years, when the parties were in the way, and there was every opportunity for asserting the demand, is strong evidence against its existence. If the one had proceeded to enforce the award, the other would probably have taken steps to set it aside; it has never been disturbed only because it has never been asserted. This long neglect corroborates the Defendant's statement, that the parties did not venture to act upon this adjudication in their favour, from being aware that it was destitute of justice.

I would just say a word on the case of *Trash v. White* (a),

(a) 3 Bro. C. C. 289.

which

1820.

CHRISTOPHERS
v.
SPARKS.

which has been cited, where Lord *Thurlow* thought that twenty years without payment of interest or demand created a presumption that the debt was satisfied. I have always understood it to be a principle, that when the twenty years have run upon a bond debt, without any thing to break the time, or any circumstances to account for it, that presumption did arise; but not operating as a positive statutory bar, it may be met by evidence, and by circumstances introduced to explain it. In the argument, the case of *Toplis v. Baker* (a) was mentioned, where it is said, that the same presumption does not arise in the case of a mortgage; and *Leman v. Newnham* (b) is referred to, where the same doctrine is stated by Sir *W. Fortescue*. The principle on which the opinions expressed in those cases rests is, that though the mortgagor may continue in possession, he is tenant at will to the mortgagee; there is therefore no adverse possession, and the mortgagee may, at any distance of time, assert his title. In support of the contrary doctrine there are the cases of *Hales v. Hales* (c), and *Sibson v. Fletcher* (d), and the case of *Trash v. White*, before Lord *Thurlow*, determining mortgages to stand on the same footing with bonds, in respect to the presumption arising from non-payment of interest for a long period.

I would not have it understood that I intend to decide this point, but I cannot accede to the doctrine that no length of time will operate against a mortgagee who has been out of possession without claim or acknowledgment. The argument from there being a tenancy at will, arises from a mere fiction; for there is no actual tenancy, no demise, either express or implied. The mortgagor has not even the rights of a tenant at will; he may be turned out of possession without notice, and is

(a) 2 *Cor.* 118.(c) 1 *Ch. Rep.* 105.(b) 2 *Ves. sen.* 51.(d) 1 *Ch. Rep.* 59.

1820.

CHRISTOPHERS
v.
SPARKE.

not entitled to the emblements. It is only *quodam modo* a tenancy at will, as Lord *Mansfield* says in one of the cases (a). We cannot push it to that extent, reasoning on the supposed relation of landlord and tenant, which is not founded in fact. The relation of mortgagor and mortgagee is peculiar; in a court of equity the former is considered as the owner; and that is the nature of the contract between them; the tacit agreement is, that he is to be the owner if he pays. Then, what is to be the effect of one person's continuing for twenty years in possession of the estate of another, who does nothing to make good his title, and to keep alive the relation of mortgagor and mortgagee?

The difficulty I feel is, that if twenty years' possession, without claim on the part of the mortgagee, will not operate as a defence against him, I do not see how any period of time, however long, can bar him. If the fiction of the tenancy at will is an answer to the objection after twenty years, why will it not be an answer after any other time? there would be no possibility of stopping. With respect to the mortgagor, it is clear that his equity is shut out by the mortgagee being in possession for twenty years without acknowledgement; then why should not this be reciprocal? Why should it be necessary for the relation to be kept alive in the one case and not in the other? For these reasons, though I do not give a positive opinion, I cannot agree to the doctrines intimated in the cases I have alluded to. The point, in fact, was not decided in either of these cases; they turned upon particular circumstances.

In the present case, however, the question is not as to the payment, for the admission in the answer repels the presumption that might otherwise have arisen. The

(a) *Moss v. Gallimore*, Doug. 269.

1820.
 CHRISTOPHERS
 v.
 SPARKS.

question here is with respect to the original existence of the debt, and on that the time affords a strong ground of presumption in favour of the Defendant.

Besides this, is there any case stated for equitable relief? The Plaintiffs affecting to have the legal estate, might have sold the premises without the assistance of the Court. Why should they come here, except from their title being bad? The conveyance authorised a sale in 1795, in the then state of the market; the result of a sale in 1820 might be very different, and it might be very hard now to press the authority then given: The party was to sell it for his own benefit, and might have sold it then; what equity can there be now? The foundation of the Plaintiffs' case fails by the absence of all proof of the title in which it depends, and by the strong presumption against them, arising from the evidence of long possession.

Bill dismissed with costs.

Reg. Lib. A. 1820. fo. 76.

Nov. 25.

BOEHM v. WOOD.

Receiver appointed on the motion of the vendor, pending a reference of title.

THIS was a motion for the appointment of a receiver, pending a reference of title, in a suit for the specific performance of a contract for the sale of certain estates. (a)

Mr. Hart and Mr. Stephen, for the Plaintiff, the vendor, in support of the motion, stated, that the Court had made orders similar to that sought by the present

(a) The circumstances under which the suit was instituted are stated *ante*, vol. i. p. 419.

motion,

motion, where each party wished to divest himself of the possession of the property. The appointment of a receiver was particularly called for in the present case, as the property consisted of buildings and offices on which it would be necessary to effect insurances, and of ornamental grounds which required considerable expenditure and attention. All the Defendant's objections to the title had been answered, but some time must elapse before the cause could be heard.

1820.
Boggs
v.
Wood.

Mr. *Sturges* opposed the motion, observing, that all the objections to the title were not removed, and that the expence of a receiver, if one was appointed, ought to be borne by the vendor, whose duty it was to have his title ready.

The Lord Chancellor.

The proper order to be made is, that a receiver should be appointed, reserving the consideration of the question, at whose expence it should be.

WATKINS v. MAULE.

Rolls.
Nov. 30.

SIR ROBERT SALUSBURY being indebted on his private account, and also as a partner in the banking-house of Sir Robert Salusbury and Co., to Messrs Down, Thornton, and Co., in March 1812, executed a conveyance to them of certain real estates in the county of Monmouth, by way of mortgage, with a power of sale to

A promissory note is drawn for the accommodation of A., who transfers it to B. and C., without endorsement, for valuable consideration, and after-

wards becomes bankrupt, and dies intestate. Held that B. and C. might recover against the drawer, the note having been endorsed several years after it was due by B. to B. and C.; B. having for that purpose procured letters of administration to the effects of A.

secure

1820.

WATKINS
v.
MAULE.

secure the debt due on his private account, and then, upon trust, to apply the produce in liquidation of the partnership debt. Messrs. *Down, Thornton*, and Co. afterwards agreed to make further advances to Sir *Robert Salusbury* and Co., on condition of having promissory-notes to the amount deposited, by way of security. Accordingly, on the 12th *May*, 1813, Sir *Robert Salusbury* and Co. remitted, without indorsement, a promissory-note for 2000*l.*, dated the 17th *April*, 1813, payable at twelve months to Sir *Robert Salusbury*, or order, for whose accommodation it had been drawn and signed, without consideration, by *Benjamin Hall*, Esq. Credit was given by Messrs. *Down, Thornton*, and Co. to Sir *Robert Salusbury* and Co. for the amount; which was afterwards drawn for and received by them. On the note becoming due, Messrs. *Down, Thornton*, and Co. presented it at Messrs. *Pybus* and Co.'s, where it was made payable, who paid it out of effects of *Hall's* in their hands. *Hall* remonstrated with Messrs. *Down, Thornton*, and Co. on their having procured payment of the note, stating, that at the time when he signed it, he had been assured by Sir *Robert Salusbury*, that he would not be called upon for payment, unless a deficiency should arise upon the sale of his estates. Messrs. *Down, Thornton*, and Co., yielding to these representations, repaid the 2000*l.*, and took back the note, upon an understanding that *Hall* should pay them the amount, in the event of the produce of the sale of Sir *Robert Salusbury's* estates proving insufficient to satisfy their debt.

In *December* 1815, Sir *Robert Salusbury* became a bankrupt; and *Edward Down*, a partner in the house of *Down, Thornton*, and Co., was chosen his assignee. The estates were sold, and, after the application of the produce in payment of the debt of Messrs. *Down, Thornton*, and Co. there remained a considerable balance due to them

them from Sir *Robert Salusbury*, and from the partnership of Sir *Robert Salusbury* and Co. *Down, Thornton*, and Co. then applied to *Hall* for payment of the note, and commenced an action against him upon it, when he offered to give a bond for the amount, which offer was acceded to, and the proceedings in the action were stopped; but before the execution of the bond, *Hall* died suddenly. A creditor's suit having been instituted for the administration of his estate, and a decree pronounced, Messrs. *Down, Thornton*, and Co. carried in a claim for the amount of the note in question, and interest, which was rejected by the Master. *Edward Down* afterwards, in *July* 1820, took out letters of administration to Sir *Robert Salusbury*, who had died intestate, in 1817. He then indorsed the note to himself and partner, but the Master was still of opinion against their claim, and they now petitioned for leave to file exceptions to his report, stating, that they had not been able to carry in objections in the usual course, from not having had notice of the time when it was prepared and signed. The petitioners stated, that they had not discovered the want of indorsement on the note till some time after the death of Sir *Robert Salusbury*; and it was said on the other side, that that fact was also unknown to *Hall* and his solicitors, at the time the action mentioned above was brought against him.

1820.
 WATKINS
 v.
 MAULE.

Mr. *Horne*, Mr. *Shadwell*, and Mr. *Pemberton*, in support of the petition.

The promissory note on which the claim is founded, was transferred for valuable consideration before the bankruptcy; and, therefore, the bankrupt, though the indorsement was forgotten, retained no interest in it: with respect to the note, he was in the situation of a trustee, and nothing passed to his assignees. Hence

1820.

WATKINS
v.
MAULE.

an indorsement by him after the bankruptcy would have been good: *Smith v. Pickering* (a), *Arden v. Watkins* (b); and he might have been compelled to complete the security, by performing that act. The indorsement by his administrator is equally valid (c); and it is no objection, that the administration was taken out for this particular purpose; for it was a duty which the bankrupt was bound to perform. Being in the hands of holders for valuable consideration, the circumstance of its being an accommodation-note does not affect them. Independently of this, *Hall's* subsequent promise to pay is sufficient proof of the debt.

Mr. *Heald* and Mr. *Cooper*, on the other side, waived any objection to the form of the application; but observed, that the circumstances appeared only on the affidavits of the Petitioners, which are not admissible when the debt is contested (d), and which had not been answered or objected to, as the Master's opinion was against them, upon their own statement; they therefore desired that the affidavits might not be considered to be conclusive as to the facts. They then contended, 1st, That the consideration being paid to the partnership, and not to Sir *Robert Salusbury* himself, did not bind the accommodation drawer. 2dly, That the indorsement being made six years after the note became due, after the death of the bankrupt, by an administrator, who was himself one of the holders, was not operative. A party taking any negotiable instrument after it is due, takes it accompanied with all the equities, and with all the infirmities to which it was subject in the hands of the indorser. —

(a) *Peak, N. P. C.* 50.

(b) 3 *East*, 317., and see *Ex parte Greening*, 13 *Ves.* 206, *Ex parte Mowbray*, ante. vol. 1. p. 428.

(c) *Rawlinson v. Stone*, 3 *Wils.* 1. 2 *Stra.* 1260

(d) See *Fladong v. Winter*, 19 *Ves.* 196

Boehm v. Starling (a), *Roberts v. Eden* (b), *Goggerly v. Cuthbert* (c), *Crossley v. Ham.* (d) And therefore, the character of holders for valuable consideration does not put the Petitioners in a better situation, as against *Hall*, than the bankrupt would have been in, if he had retained it, and he could not have brought an action. There was no way of compelling Sir *Robert Salisbury* to indorse the note before his bankruptcy; and afterwards, he could not have been compelled without the assent of his assignees. The indorsement was the voluntary act of the administrator, for the purpose of making himself a creditor. The promise said to have been made afterwards, cannot be relied on, having been without consideration, and under the idea that the indorsement was regular; besides being void, under the statute of frauds, as a promise to pay the debt of another.

1820.
WATKINS
v.
MAULE.

The MASTER of the ROLLS.

In the shape in which this comes before the Court, I do not think that I can refuse, if it is insisted on, to send it back to the Master for a further inquiry into the facts. If the parties opposing the allowance of the Petitioners' debt, thought it unnecessary to controvert their statement, from a reliance on the legal consequences being against the claim; if that was their reason for not disputing the facts, which they now think they can succeed in disproving, I think it is fair that they should have an opportunity of so doing; but, at present, we must suppose the circumstances to have been as they are now represented.

The note was dated the 17th *April* 1813, payable to Sir *Robert Salisbury*, or order, twelve months after, and

(a) 7 *T. R.* 423.

(b) 1 *Bot. & Pul.* 398.

(c) 2 *N. R.* 170,

(d) 13 *East*, 498.

1820.

WATKINS
v.
MAULE.

was remitted to the *London* banking-house of the Petitioners in *May* 1813. Upon receiving it they gave credit to Sir *Robert Salusbury* and Co. for the amount, the whole of which was afterwards drawn for and paid. Though this was not a payment personally and individually to Sir *Robert Salusbury*, yet it was a consideration moving towards him, being a payment to a house in which he was a partner, he having transmitted it for the purpose of obtaining the advance, and being benefitted by it jointly with the other partners. Upon its becoming due, an application is made to *Pybus* and Co., who pay it. Shortly after, *Hall* learning this, a meeting takes place between him and the Petitioners; but nothing is said about the want of indorsement; he does not dispute the payment on that ground, but because it was given originally only as a guarantee, thus admitting, that, in other respects, there was no objection to it. He was then liable to pay, as I take it for granted he knew the purpose for which the note was to be used, and the indorsement might have been added at any time. There was, therefore, an admission on his part of his liability, it being understood, that he was only to be resorted to in the event of a deficiency. On the footing of these communications, and in reliance upon him, the money was actually repaid by the Petitioners in a manner very honourable to themselves. It is said, that this was only an agreement to pay the debt of another; but at the time he promised, he had actually been made responsible; he could not have got back the money, without an action, and, in consideration for their returning it to him, he makes this promise; then, is not that sufficient to bind him?

Salusbury and Co. were unable to pay, and afterwards became bankrupts. Proceedings were then commenced against *Hall*, and if he conceived that he could, for any reason,

reason, resist the action, he knew the proper mode of defending it: but instead of that, the action is stopped by his undertaking to give a bond, and the costs were paid by him. He did not therefore mean to question the propriety of the action, but recognized the justice of it. The circumstance that prevented the bond from being executed in his life-time, was, that it was intended to include the interest that was due; and he died before the interest was calculated.

1820.
WATKINS
v.
MAULE.

After all this, difficulties are now made. It is said that the indorsement is bad, because it is by an administrator, and made six years after the note was due, and after the bankruptcy of the party who transferred it. But is there any difference between an indorsement by the party himself, and one by his personal representative? There is no doubt that when the note was remitted it was intended that it should be a security, and when a note is handed over for valuable consideration, the indorsement is a mere form; the transfer for consideration is the substance; it creates an equitable right, and entitles the party to call for the form. The other is bound to do that formal act, in order to substantiate the right of the party to whom he has transferred it; and as he is bound to do it, the indorsement by his representative is undoubtedly as good as if it was by himself. The six years that had elapsed does not affect the validity of the indorsement; the transaction in 1817 with *Hall* was enough to take it out of the statute of limitations.

No difference between indorsement of a note by the party and one by his personal representative.

A note being handed over for valuable consideration, the indorsement is a form which the party is entitled to call for.

Nor is it of any importance that the indorsement was by a person holding the double character of administrator and indorsee, because it was a mere form; not passing any thing substantial. If a note or bill is transferred without indorsement for valuable consideration, before

1820.

WATKINS

v.

MAULE.

the bankruptcy, the holder may afterwards call on the bankrupt or his assignees to indorse it, which, according to *Smith v. Pickering*, and the other cases, will make it as valid as if it had been indorsed at first; for the equitable right attaches at the time of the transfer, and the assignees succeed to all the equitable rights and liabilities of the bankrupt. The act of the bankrupt could not have the effect of passing any substantial interest, but it is operative in this instance, because it is only a form necessary to give validity to a security that was previously good in substance.

The cases that have been cited to establish the position, that the indorsee of a note, after it is due, takes it subject to the equities affecting it in the hands of the indorser, do not apply here; for that is only true, when the note is due at the time it is first taken. When that is the first transaction, he then takes it with a degree of suspicion attached to it. But that has no application to a case, where the transfer was before the note became due, and where the equitable right had therefore passed before the day of payment. (a) Its being an accommodation-note makes no difference; it is equally good as between the holder for valuable consideration, and the drawer. I am clearly of opinion, that the indorsement was sufficient to give effect to the antecedent right, that vested at the time when the consideration was paid, and that the promise made afterwards by *Hall*, for which there was abundant consideration, is binding on his personal representative. Supposing the facts to be as they are stated, his assets are liable; but if there is any dispute about the truth of the statements, all that can be

(a) The indorsement has relation back to the time of the delivery of the bill. See *Anon.* 1 *Campb.* 492. n.

done is, to refer it back to the Master to enquire into the Petitioners' claim.

1820.

WATKINS
v.
MAULE.

His Honour doth order, that it be referred back to Mr. J. to review his report, bearing date the 5th day of June, 1820; and it is ordered, that the said Master do enquire into the validity of the Petitioners' charge for the sum of 2000*l.*, in the petition mentioned, to be due to them as surviving partners, as in the said petition mentioned; and the said Master is to state his opinion thereon to the Court, whereupon such further order shall be made as shall be just.

Reg. Lib. B. 1820. fo. 127.

Ad 4 Gen. l.
Discontinued } *120 Wontner*
364

FOLEY v. WONTNER.

Nov. 25.

THIS was a bill by some members of a dissenting meeting-house against the trustees and committees, for a general regulation of its affairs, according to a trust deed executed in May 1796, at the time of its original erection. In the year 1803, the ground on which the meeting house stood being required for the purposes of the *London Dock* act, a new meeting-house was built on another spot, and on that occasion, a new trust deed was executed, differing from the former, by transferring the power of filling up the vacancies amongst the trustees and committees, from the congregation at large, to the surviving trustees and committees. This alteration was alleged to be conformable to the original resolutions of the congregation, in 1796, from which the deed then executed had in that particular deviated. There were to be five committees and thirteen trustees, in whom the

Jurisdiction for execution of a trust for supporting a dissenting meeting-house, difficult to exercise.

Intelliger } *3. M. H. R 4*
Mitchell } *Dill*
75. 881. 84 } *Watson* | *2 Jones*
same case | *65-*
76

1820.

FOLEY
v.

WONTNER.

legal estate was vested; and, from time to time, on the appointment of new trustees, proper assignments were to be made. It appeared that various disputes had arisen.

On the filing of the bill, an injunction had been obtained, to restrain the Defendants from shutting the chapel, or excluding any of the congregation. A motion was now made to dissolve the injunction; and a cross motion was made, at the same time, for the appointment of a receiver.

Mr. Hart and Mr. Simpkinson, for the Plaintiffs.

Mr. Agar and Mr. J. Martin, for the Defendants.

The *Lord Chancellor* said, he had several times been called upon to execute trusts, with respect to these dissenting meeting-houses, held under trust deeds; but what the Court could do in such cases was very little. Considering their number, it was much to the credit of dissenters that their affairs were not more frequently made the subjects of suits; when they had been, he had never known any good result from it.

If this stands on the first deed only, and was the case of any other trust, it seems to me, that if they have not filled up the whole number of trustees and committees, the power of the remainder is gone. The deed is on the principle which, I believe, governs most dissenting congregations, that the trustees and minister are to be elected; and it provides that due assignments are to be made from time to time. These persons cannot associate others with them to act as trustees; they must be trustees or nothing. In such a case, unless it differs from all other trusts, the Court would fill up the number, referring it to the Master to appoint proper persons, and when appointed, would direct them to carry on the trusts of the deed.

deed. Having neglected to fill up the vacancies, there is no one now who has any power. I apprehend neither the congregation nor any one else can fill them up; it must be done by the Court.

1820.
FOLEY
v.
WONTNER.

With respect to the minister, the practice of the Court, in these cases, is, if they find a minister in possession, and ministering in the way in which it was the meaning of the congregation that he should, preaching the doctrines that were intended, to continue him in the mean time, whether he was duly appointed or not; for the first point is to have the service performed; and the Court will pay him his salary.

Pending a suit for the regulation of a dissenting meeting-house, the minister, if performing his duty, will in general be continued, whether duly appointed or not.

One of the most difficult questions in these cases is, what is to be the course when the doctrines, which it was originally matter of agreement should be inculcated, are not adhered to by all the congregation; some of them having changed their religious opinions. I take it to be now settled by a case in the House of Lords, on appeal from Scotland, that the chapel must remain devoted to the doctrines originally agreed on. I think I acted on that in the case of a chapel in Worcestershire (a).

A dissenting meeting-house must continue devoted to the doctrines, originally agreed on at the foundation of the trust, though some of the congregation may change their opinions.

His Lordship desired the motions to stand over till the next seal, and strongly recommended the parties to come to some arrangement in the mean time.

The motions were brought on again; no arrangement having been effected. December 6.

The LORD CHANCELLOR.

If the parties cannot agree as to the trusts on which

(a) See *Craigdallie v. Aikman*, 1 Dow. P. C. 1. *Attorney-General v. Pearson*, 5 Mer. 352.

the

1820.
FOLEY
v.
WONTNER.

the meeting-house is now held, I must refer it to the Master to inquire what the trusts are, and in the mean time enjoin all parties from doing any thing to disturb the state of things now existing. The appointments of trustees are nothing, and the persons are no trustees till they can join in all the acts, that form the duty of the trustees. It will be much better, if they can, to settle it out of Court; if they cannot before Saturday, I will dispose of the motion; but I do not at present see my way to any thing but sending it to the Master. I am almost afraid that I am doing what may subvert the peace of many religious societies, in showing the infirmities of the law on this subject.

A reference to arbitration was afterwards agreed to.
Reg. Lib. A. 1820. fol. 538.

1820.
ROLLS.
December 2.

HILL v. MASON.

Bequest of the balance in the hands of testator's agents at the time of his death, held to include a sum which he had by letter directed them to invest in the funds, but which was not invested till after his death.

LIEUTENANT-COLONEL J. HILL, by his will, gave to his wife, the Plaintiff, whatever balance might be in the hands of Messrs. *Greenwood and Co.*, his agents, or any other agents he might have at the time of his decease. The testator, at the time of making his will, and of his death, which happened on the 31st *August*, 1819, was residing in the island of *Jamaica*. On the 5th of *August*, 1819, he wrote to Messrs. *Greenwood and Co.*, desiring them to purchase, in his name, a sum of 550*l.* 3 *per cent.* consols. The letter reached them on the 28th *September* in the same year, and on the 13th *October* following, before the news of his death had arrived in *England*, they laid out 378*l.* 2*s.* 6*d.*,

1820.
HILL
v.
MASON.

Mr. Raithby, for the Defendants.

Reg. Lib. A. 1820. fo. 123.

• 1820.
ROLLS
Dec. 2. 4.

A bill will not lie to set aside an award on a question of fact referred to arbitration, except for corruption, partiality, or irregularity of conduct in the arbitrators. No remedy in equity for the recovery of

nership;

Walsh & Student
42 N. W. 166

1820.
GOODMAN
v.
SAYERS.

nership; but the Plaintiff and the Defendant *Sayers*, continued it for half a year longer. Differences arising between the two latter on the subject of their partnership transactions, they agreed to refer them to arbitration; and they accordingly, in *August* 1812, executed general bonds of arbitration, submitting all matters in dispute to the Defendants, *W. C. Newland*, and *J. Cooper*, and to *H. Hobbs*, or any two of them, and agreeing, that the submission should be made a rule of the Court of King's Bench.

One of the questions discussed before the arbitrators was upon a claim made by *Sayers* to be a sharer with *Goodman* in the profits of three cargoes of wheat, ordered by the latter in their joint names. It was stated by *Goodman*, that these cargoes were purchased on his separate account; but that the two first, being bought of houses with whom he and *Sayers* had some dealings in oats in the course of their partnership, he had, by the permission of *Sayers*, made use of his name in the order: the last cargo, he said, was ordered in his own name only; but he refused to produce the invoice and documents relating to it, contending, that these wheat transactions took place on his separate account, and were not meant to be included in the reference. *Sayers* denied having authorized the use of the joint name in the orders in question, and said, that he had only accidentally discovered the fact. The arbitrators concurred in thinking, that the purchases of the two first cargoes should be treated as partnership transactions; and *Newland*, and *Cooper* were of opinion, that the proceeds of the third cargo, on which there was a considerable profit, ought also to be brought into the account; and expressed their intention of deciding accordingly; the other arbitrator, *Hobbs*, who had been appointed by *Goodman*, was much dis-

1820.

GOODMAN
v.
SAYERS.

dissatisfied with this determination, and declared he would have nothing more to do with the reference; on one occasion he left the room in anger; but it appeared that he was prevailed upon by *Cooper* to return and proceed with the business. *Newland* and *Cooper* determined to make their award alone; but they previously prepared a case upon these three cargoes, for the opinion of *Mr. Hart*. The case stated the whole to have been bought in the partnership name, without the knowledge of *Sayers*. The opinion of *Mr. Hart* upon the circumstances stated was, that *Sayers* was entitled to participate in the profits. At the next meeting, the case and opinion were produced, when *Hobbs*, still refusing to concur, they parted without coming to any conclusion. A few days afterwards, on the 9th October, 1812, *Newland* and *Cooper*, without giving notice to *Hobbs*, signed their award, by which they directed the Plaintiff to pay the sum of 432*l.* 18*s.* 1*d.* to *Sayers*, and ordered that a balance of 307*l.* 19*s.* due by them, on their joint account, to a house at *Lewes*, should be paid by them in equal proportions.

The Plaintiff having refused to comply with this award, *Sayers* commenced an action against him upon the bond; and, in March 1813, the Plaintiff being, as he said, informed by his solicitor that he had no remedy, submitted to pay the 432*l.* 18*s.* 1*d.*, upon an agreement that some alleged errors, for which he claimed an allowance, should be investigated. The three arbitrators met again for this purpose, when the Plaintiff produced a statement of errors, which were found to be matters that had been previously decided, excepting two items, which the Plaintiff had, on the former occasion, omitted to bring forward, for which they allowed him 25*l.* 3*s.* 1*d.* This sum was repaid to him by *Sayers*.

The

1820.

GOODMAN
v.
SAYERS.

The bill was afterwards filed, in *February*, 1814, against *Sayers*, *Newland*, and *Cooper*, imputing partiality and misconduct to the two latter, and praying that the award might be set aside, and the accounts taken; and that the Defendants might be restrained from making the submission a rule of Court. The three arbitrators, and several other persons, were examined as witnesses. It was stated by *Hobbs*, that the Plaintiff's banker's books had been offered to prove, that he had alone paid for the wheat; but the other arbitrators had refused to receive the evidence; he accused *Newland* and *Cooper*, particularly the former, of evincing great partiality; and they, in their evidence, made the same accusation against him. They also said, that the Plaintiff had, at first, denied that any wheat had been ordered by him in the joint names of himself and *Sayers*; but that, on being cautioned by *Hobbs*, that there were documents to prove it, he admitted the fact. Another witness, *John Apps*, who was clerk to the Plaintiff, deposed to declarations by *Sayers*, that he had no interest in the wheat, and to his having consented to the use of his name in the orders; it appeared that all the three cargoes had, in fact, been bought in the joint names.

Mr. *Wingfield* and Mr. *Skirrow* for the Plaintiff.

This award ought to be set aside, on account of the gross partiality of the two arbitrators, by whom it was made. This is proved by the evidence of *Hobbs*, and by various circumstances, such as their entertaining the question as to the wheat, which was not intended to be referred; rejecting the evidence of the bankers, and of their books; their not examining *Apps*, the clerk, whose evidence proves the wheat not to have been bought on account of the partnership; and particularly by their acting under the reference in the absence of the third arbitrator, and
without

without his knowledge. They privately prepared a case, unfairly stated, and finally made their award without consulting *Hobbs*, or giving him notice of the meeting. Though two may have the power of acting, yet they must not exclude the third; every arbitrator must be summoned and have an opportunity of being present. *Dallen v. Machin*. (a) The parties who have referred the matter to three persons, have a right to the exercise of the judgment of each. Though those who attended form the majority, and the other, if he had been present, could not have prevented their determination, yet his view of the case, and his arguments, might have influenced their opinions; and therefore private meetings, or the exclusion of one arbitrator by the others, vitiates the award. *Burton v. Knight* (b), *Metcalfe v. Ives* (c), *Chicot v. Lequesne* (d). *Hobbs* having once said that he would not continue to act, was no ground to absolve them from giving him notice; though he hastily uttered this expression, yet it was evidently not his settled purpose, for he returned and proceeded in the business. Even if it had been apparently a more deliberate declaration, a notice of the meetings was still necessary; there should have been a *locus pœnitentiæ*: he might have altered his determination, and have resumed his office.

1820.
GOODMAN
v.
SAYERS.

The award not having been made a rule of court, no difficulty arises here, as in *Fetherstone v. Cooper* (e), and *Gwinnett, v. Bannister* (f); from the statute (g) which does not, in other cases, interfere with the equitable jurisdiction; *Lucas v. Wilson* (h); *Lord Lonsdale*

(a) *Barnes's Notes*, 57.

(e) 1 *Atk.* 64.

(c) 9 *Ves.* 67.

(g) 9 & 10 *Will.* 3. c. 15.

(b) 2 *Vern.* 514.

(d) 2 *Ves. sen.* 515.

(f) 14 *Ves.* 550.

(h) 2 *Burr.* 701.

1820.
 GOODMAN
 v.
 SAYERS.

v. *Littledale* (a). The Plaintiff could not have proceeded at law, as he has paid the money; a circumstance which will not, in a court of equity, prevent his seeking relief from a fraud. In *Norgate v. Ponder* (b), and *South Sea Company v. Bumstead* (c), awards were set aside for fraud, after they had been performed, and releases given.

Mr. *Heald* and Mr. *Sugden*, for the Defendants.

As against the Defendants, the arbitrators, the bill must of course be dismissed; they ought not to have been made parties, as no relief, not even the payment of costs, is prayed against them.

The reference to arbitration was general of all matters in difference, and it was, therefore, clearly right to investigate the transactions relative to the wheat; parol evidence cannot be introduced to exclude one of the subjects of dispute. The wheat was ordered in the joint names, making both liable with respect to third persons, from which the presumption is, that it was a partnership transaction *inter se*. *Peacock v. Peacock* (d); and there was no evidence to prove the contrary. But this was a mere question of fact, of which the arbitrators are judges, without appeal; an award cannot be set aside on the ground of their having formed an erroneous conclusion. *Knox v. Symmonds* (e), *Morgan v. Mather* (f), *Dick v. Milligan*. (g) There is no evidence of any misconduct, except on the part of *Hobbs*; his behaviour made it unnecessary to give him notice, but the other arbitrators practised no concealment; he was informed of their intentions. The

(a) 2 *Ves. jun.* 451.

(b) *Nels. Ch. Rep.* 6.; and see *Morgan v. Pindar*, 3 *Ch. Rep.* 76. which is probably the same case.

(c) *Fin. Ab.* vol. iii. p. 140.

(d) 2 *Campb.* 45.

(e) 1 *Ves. jun.* 569. 3 *Bro. C. C.* 358. (f) 2 *Ves. jun.* 15.

(g) 2 *Ves. jun.* 23. 4 *Bro. C. C.* 117.

banker's

banker's books were not evidence; and it was the Plaintiff's own fault that *Apps* was not examined; he might have called him.

1820.
GOODMAN
v.
SAYERS.

The Defendants are free from all blame: but if the award had been open to any objections, the Plaintiff having, upon an action being brought, paid the sum awarded, with full knowledge of all the circumstances, can have no relief against that which is his own act. Money paid under a demand of right can never be recovered back. *Brisbane v. Dacres*. (a) The party may litigate or submit; if he submits and pays, it is conclusive. This has been repeatedly decided in actions for money had and received, which are governed by the same equitable principles as suits in this Court; and, therefore, payment under such circumstances is equally conclusive against relief in equity.

Mr. *Wingfield*, in reply, referred to Lord *Lonsdale v. Littledale* (b), as an authority for making the arbitrators parties to the bill, when misconduct and fraudulent combination is imputed to them. The payment of the money was accompanied by an agreement, that the matter should be referred back to the arbitrators, and re-examined by them; it was not, therefore, an admission of the correctness of the award. If the Plaintiff could not have recovered at law the sums that he paid, it does not follow that he may not succeed here; courts of equity give relief against awards in cases where there is no legal remedy, as in *Norgate v. Ponder* (c), and as

(a) 5 *Tunt.* 143.; and see *Spraggs v. Hammond*, 2 *Brod. & Bing.* 59., and the cases there referred to.

(b) 2 *Ves. jun.* 451.

(c) *Nels.* 6.

1820.

GOODMAN

SAYERS

is intimated by Lord *Ellenborough* in *Braddick v. Thompson*. (a)

The MASTER of the ROLLS.

The circumstances of this case are these: the Plaintiff and the Defendant, *Sayers* and *Cobden*, in the year 1811, jointly engaged to supply the barracks with oats and forage, wheat not forming one of the subjects of the contract; at the end of three months *Cobden* retired, and the business was then confined to the Plaintiff and *Sayers*. The case made by the bill is, that the Plaintiff, who was a cornfactor, was not to be interfered with by the others in that trade, which he continued to carry on upon his own account, and in the course of which he ordered these three cargoes of wheat. The period does not precisely appear, but the first two seem to have been ordered in 1811, and the third in 1812, being after the connection with *Cobden* had ceased. Upon the expiration of the contract, disputes arose between the Plaintiff and Defendant, which ended in a general reference, accompanied with bonds, to submit to the award of the three arbitrators, or of any two of them. Two of the arbitrators make this award, and upon the Plaintiff's refusing to pay the sum adjudged to be due from him, an action is brought against him. This action was about to be tried, but was discontinued, as is stated by *Freeland*, who was *Goodman's* attorney, upon an agreement that the money should be paid, and certain alleged errors should be investigated; but that the investigation was not to affect or prejudice the award. The result was, that 25*l.* 3*s.* 1*d.* was found to have been omitted, and *Goodman* paid the costs of the action, after deducting that sum. *Sourton*, the attorney of *Sayers*, says that

(a) 8 *Est*, 344. 347.

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the 25*l.* 8*s.* 1*d.* was received as a voluntary payment on the part of *Sayers*, and as a final settlement of all matters between him and the Plaintiff.

1820.
Goodman
v.
Barth.

The money having been paid under these circumstances in *March* 1818, the bill is filed in the *February* following, to set aside this award, and to have the accounts taken. The Plaintiff alleges, that a wilful and corrupt error was made by the two arbitrators, in charging him with the profits of the third cargo, which was not intended to be included in the reference, being a private concern of his own; that *Hobbs* tendered evidence to prove this, and to show that *Sayers* acquiesced in the orders being given in the partnership name. He complains that this evidence was rejected, and likewise charges *Newland* with having acted throughout as the advocate of *Sayers*, and *Cooper* with having too easily acceded to his proposals, and imputes to them, as a proof of corruption, that they took an opinion on a case not fairly stated, without the knowledge of *Hobbs*, and, finally, drew up their award in his absence, and without giving him notice.

—On the other hand, the Defendant says, that the wheat was the principal subject of dispute, and that it was intended to be referred, and that before the arbitrators the Plaintiff resisted his claim on another ground, asserting on oath, that the orders were given for himself, and in his own name only; but that *Hobbs*, who was acquainted with the fact, advised him to be cautious, as there were documents before them that proved it. The Plaintiff then took up another ground, namely, that he had *Sayers's* authority to use his name in this transaction, although it was understood, that he, the Plaintiff, only was to be interested in it. The other arbitrators retired

1820.
 GOODMAN
 v.
 SAYERS.

upon *Hobbs* the accusation of having acted as partizans : and there seems to be some reason for it, when we find him cautioning *Goodman*, as to the evidence he was to give, and then joining with him in blaming the merchants, of whom the wheat was purchased, for having furnished the letters relating to it. He concurred with the other arbitrators in taking the account of the two first cargoes, on one of which there was a loss, certainly not considering that beyond their jurisdiction ; yet, when they came to the consideration of the third, he actually advised the Plaintiff not to produce the documents concerning it that were in his possession ; conduct not becoming in a judge, to interpose his recommendation to a party to keep back evidence.

As to the alleged misconduct in rejecting evidence, we must observe, that the fact of the wheat having been paid for by *Goodman* only, was not disputed ; and the banker's books could not therefore have carried it any further ; they could not show in whose names the wheat was ordered ; they could only prove who paid for it, and that was admitted. Their taking the opinion of counsel, instead of evincing corruption, is argued to be a proof of their conscientious desire to adjudicate fairly. The case was correctly stated, except in not introducing the fact, that *Sayers* was privy to the orders having been given in the joint name ; but it was unquestionably produced at the last meeting ; and though it was originally prepared without the knowledge of *Hobbs*, he might then have pointed out the omission. He says that he complained of their having taken this opinion clandestinely, and that he left the room. It seems, likewise, that he declared he would have nothing more to do with it ; that he saw their minds were made up to act on a mistaken notion. Though he did afterwards return to them, yet, having
 declared

declared that he would not concur in the award, they met to sign it without him : but it is clear that all the evidence was received, and the business fully discussed in his presence ; all the substance was settled while he was with them ; and they informed him upon what principle they meant to decide. It is therefore very different from the case of two meeting privately to settle their award, without the knowledge of the other.

The first question is, upon the merits, whether the Plaintiff had justice done him by the arbitrators ; in considering which, I wish it to be understood, that I decide this case upon the principle, that no bill in equity will lie to set aside an award, on a question of fact, within the province of the arbitrators, and decided by them. They are the judges chosen by the parties, and no court of law or equity has any cognizance of the matter, by way of appeal from their decision : the consequences of such a jurisdiction would be most mischievous : for the very definition of a good award is, that it gives dissatisfaction to both parties, and the result therefore would be, that applications of this kind would be continually made upon frivolous grounds. In letting in evidence of the merits, I never permitted it for the purpose of showing what the merits were ; and I consider it myself, only so far as it may tend to prove such a case of misconduct, on the part of the arbitrators, as would give this Court jurisdiction.

1820.
GOODMAN
v.
SAYERS.

On a bill to impeach an award, evidence of the merits only to be received so far as it throws light on the conduct of the arbitrators.

I take it to be the fact, that this question was referred ; for the reference is general, extending to all matters in dispute, and this point was in dispute between them at the time. That it was so, I must assume, not only from the general terms of the reference, but from the conduct of the parties ; for *Sayers* brought it forward at the first meeting, *Hobbs* concurred in the investigation, and *Good-*

1820.
 GOSSMAN
 v.
 BRYAN.

man attended, and discussed it. It is clear that the question was before them; it was a question of fact, of the fact of partnership, and was therefore proper for the decision of arbitrators. Their decision must be final and conclusive, unless the Plaintiff can fix upon them corruption, partiality, misconduct, or irregularity. The *onus* of proving that lies upon him.

Then how is it proved? *Hobbs's* assertion is not sufficient; for the accusation is retorted upon him, and there are strong circumstances to show, that he took a part beyond that of a fair arbitrator; interposing to regulate the evidence of the Plaintiff, and to advise the non-production of documents. His stating it generally, is not enough. What facts are there to prove partiality against them? Their not receiving the banker's books is nothing, for they were offered to prove a fact that was not disputed. Their not calling other witnesses is nothing; for it is the business of the parties to produce their witnesses. If the parties omit it, it is no ground of imputation against the arbitrators, when a material witness has been subsequently discovered, that they did not call him. It is the Plaintiff's own fault that *Apps* was not examined. How could the arbitrators know that his evidence would be material.

The Plaintiff, in appealing to this Court, from a decision on a question of fact, makes a new case, by introducing evidence that he neglected to bring forward before the inferior tribunal. When they found that the wheat was ordered by him in the joint names, pledging the credit of the partnership, and making his partner responsible, *prima facie*, it was to be treated as a partnership transaction. If he could have rebutted it, by showing that he had the authority of *Sayers*, why did he not do it before the arbitrators? Instead of that, he made quite a distinct

distinct case, denying that he had used the joint names in ordering the third cargo; and the arbitrators were left to take the naked fact in opposition to his assertion. They had, therefore, strong reason to suppose, that it was a clandestine act of *Goodman*, making his partner liable for the orders, with the intention of appropriating the profits to his own use; though he, as well as *Hobbs*, was willing to let him bear the loss.

1820.
GOODMAN
SAYERS

The case stated for the opinion of Mr. *Hart* was fairly drawn up in every respect, except in not mentioning, that *Sayers* acquiesced in the use of his name in the orders in question; and that was a circumstance that was not in evidence before the arbitrators. And I cannot see, that taking the opinion of counsel was any evidence of corruption; it tends to prove the contrary, for, if corrupt, they would have decided for him whom they wished to favour, without inquiring what was the law. If they had kept it secret, it might have been contended, that it was a badge of fraud; but the case was shown to *Hobbs*, the dissentient arbitrator, and he made no complaint of the statement.

The strongest circumstance is the irregularity in not citing *Hobbs* when they met to sign their award; and it certainly is true, that if two arbitrators out of three meet alone, excluding the third, or not giving him notice; and if they receive evidence, or hear discussions, without him, their proceeding is irregular. When the matter is referred to three, the arguments and the judgment of all three should be had recourse to in every stage. The cases referred to, on the part of the Plaintiff, were instances of fraudulent contrivance to exclude the third; but, at all events, it is irregular not to give him notice. Here, however, all the evidence was heard, and all the substance of the business was settled in his presence;

Irregular for two arbitrators to meet without notice to the third; but not a sufficient ground to set aside the award, when the substance was settled in his presence.
Semble.

1820.

GOODMAN
v.
SAYERS.

the rest, the signing the award, was a mere form; this they thought they were at liberty to do by themselves; they did not however act secretly, but determined, in the manner in which they had previously informed him that they should. Then, should the Court set aside the award, on account of the absence of one arbitrator under these circumstances? The cases have never gone to that length.

But that is a question which, from what took place afterwards, it has become unnecessary to decide. The Plaintiff had a full knowledge of every fact relating to this proceeding; he knew that the award was signed in the absence of *Hobbs*; indeed, it is not pretended that the circumstances were not fully known to him. He resisted it upon the same grounds on which he now complains; an action was brought to enforce it; and, if these grounds were sufficient, why did he not persevere in his resistance? He might have done so, for it had not been made a rule of Court; a precaution that should always be attended to, in order to let in the operation of that very useful statute. He might, therefore, have pleaded the fraud at law, and would have been permitted to defend on that ground. There might be instances where a party paying inadvertently, while ignorant that a fraud had been committed on him, would not be precluded from investigating the matter before another tribunal; but here, besides being acquainted with the circumstances, he had consulted with his attorney. This is not a case where discovery was wanted from the arbitrators to prove the facts; for nothing has been discovered from them. He might have proved the whole at law.

It comes then to this important question, whether a court of equity can entertain jurisdiction, in a case where an action having been brought to enforce the award, the
party

party voluntarily pays the money, upon an agreement for a reference back as to part, under which an alteration is made, of which he takes the benefit, receiving the 25%. as a final settlement of the dispute? Can he, after that, make it the subject of a bill in equity? None of the authorities go to that. It is admitted, that at law it is impossible to recover, after a voluntary payment, with a knowledge of all the facts, though under a mistake in point of law; it cannot be disputed, and though, in one of the cases (a), there was a difference of opinion among the judges, yet it is now settled, that where an action is brought and is proceeding, and the Defendant having a knowledge of all the circumstances, and having the means of proving them at the trial, submits to pay, he has no remedy at law. Then, upon what principle can it be said, that he is not concluded in equity also? The reason of the doctrine at law is, that litigation is not to be multiplied. You may dispute the demand that is made upon you; but if you do not, you have given up the point, and cannot afterwards agitate it; particularly if, as in this case, you have taken the benefit of the compromise. The principle applies equally to suits here; and you can have no relief unless you can show that, for some reason, you could not, in the action, have had the full benefit of the defence that you have made in this Court.

1820.

GOODMAN
v.
SAYERS.

Voluntary
payment, con-
clusive both
in equity and
at law, on the
principle that
litigation is
not to be mul-
tiplied.

I think, therefore, that the voluntary submission and agreement to pay, is sufficient to preclude the Plaintiff from relief here: as to the merits, they are not the same now as they were before the arbitrators; but on that the Court is not to judge: that is the province of the arbitrators; for as I can see no reason to impute to them corruption, partiality, or any other misconduct, I

(a) *Brisbane v. Dacres*, *ub. sup.*

think,

1820.
 GOODMAN
 v.
 SAGERS.

think, that on the ground of jurisdiction, the Court is precluded from inquiring into the merits. If there was any irregularity in their proceedings, it was too late to institute a suit after payment of the demand.

The bill must therefore be dismissed, and, I think, with costs; with respect to the arbitrators, it is only a bill for discovery; it prays nothing against them: therefore, as far as concerns them, it must, of course, be dismissed with costs. As to the Defendant *Sagers*, the charges made are not substantiated; and the Plaintiff must, therefore, pay the costs, particularly after the conduct that has been disclosed, and, also, for the sake of example, that we may not have such suits to impeach without cause, the decisions of a domestic forum. They must be at the peril of costs.

Reg. Lib. A. 1820. fo. 121.

1820.
 December 5.

VANSANDAÜ v. ROSE.

Defendant committed for breach of an injunction after notice of its having been obtained, although the order for the injunction had not been served.

THIS was a motion (of which notice had been personally served) that the Defendant might stand committed for breach of an injunction.

The injunction was obtained by the Plaintiff to restrain the Defendant, his tenant, from cutting down timber on the farm, and carrying away that which was already cut. It appeared by affidavit, that notice of the order for the injunction was personally served on the Defendant the morning after it was obtained, and a full explanation of the effect of it was verbally given at the same time, and that the Defendant had since cut down timber, and carried away that which had been already cut, and had also grubbed up hedges, and was in a state of insolvency.

Mr.

Mr. Knight, in support of the motion, stated these circumstances, and also mentioned, that he had made it before the Vice Chancellor, and had cited the case of *Kimpton v. Eve* (a), but that His Honour declined to make any order.

1820
Vanderkemp
v.
Ross.

The LORD CHANCELLOR.

Many of the circumstances which you mention go to show the propriety of granting the injunction: the next question is, what is the Court to do where notice of it has been given which is not accompanied by service of the injunction itself? It was held by Lord *Hardwicke*, over and over again, that if the person against whom the injunction is granted, is in Court at the time, that is notice enough; and, in a subsequent case, it was held, though I forget by whom, that if the party is on the outside of the court, and he is informed by somebody who is in the inside, that it is granted, that was sufficient notice. It appeared to me, after having much considered this subject in the case to which you allude, that in many cases all the mischief would be done, and that you might as well grant no injunction at all, unless notice of it was held sufficient; and that the point was of great importance with reference to applications for injunctions, during the long vacation, when the course is to serve the party with notice only, the injunction not being engrossed, or sealed, or brought to be sealed.

It also appeared to me, that the responsibility which a solicitor is under with respect to his duty to this Court, and his liability to be struck off the rolls, and to be indicted for perjury, were as good a security as you could have against the abuse of the practice. In this case, if the warrant of committal is sent to me, I think that I shall not hesitate to sign it. What I have now stated must be subject to this observation, that there has been

(a) 2 Ves. & Bea. 549,

1820.

VANSANDAY

v.

ROSE.

no delay in endeavouring to get the order drawn up, and the injunction under seal, and serving it when obtained.

Reg. Lib. B. 1820. fo. 66.

Nov. 28.

Dec. 5.

1820.

MARSHALL v. COLMAN.

An injunction will not be granted to restrain the breach of a covenant in articles of partnership which has not been infringed for any length of time, where the bill does not pray a dissolution of the partnership.

Whether the Court will in any case grant such an injunction, unless there is ground for, and the bill prays a dissolution of the partnership.
Quære.

IN the month of *September* 1818, articles of partnership were entered into between the Plaintiff and Defendants, by which it was agreed (amongst other things) that their business, that of wholesale linen-drapers, should be carried on in the name or firm of *Colman, Willett, Oxley, and Marshall*; and that all contracts and engagements entered into by any of the parties, on account of the said trade, and all checks and drafts drawn by them, and all receipts for money paid, on account of the said trade, should be in the joint names of the said *John Morris Colman, Henry Willett, James Oxley, and John Marshall*.

The bill, filed in *July* 1820, alleged that the Defendants, *Colman* and *Willett*, had entered into numerous contracts and engagements, and written numerous letters (under some of which goods had been supplied and delivered) in the name of *Colman, Willett, and Co.*, and had refused to add the name of the Plaintiff, or to comply with the above mentioned covenants; thus preventing him from being known as a partner, and from receiving partnership debts, and that *Oxley* consented thereto: and it prayed that the two first named Defendants might be restrained, by injunction, from carrying on the trade or entering into any contracts, &c. (pursuing the words of the covenant in the partnership articles) except in the joint

Knebell
White } 24/86
18

joint names of *J. M. Colman, H. Willett, J. Osley*, and the Plaintiff.

1820.
MARSHALL
v.
COLMAN.

The Defendants, by their answer, admitted that *Colman* and *Willett* had written numerous letters relating to the partnership business, and believed that some receipts for money might have been given in the names of *Colman, Willett*, and Co., and sometimes in the name of *Colman*, and Co., on account of the great inconvenience of writing four names at length; and insisted that it was a very common practice in partnerships where the parties are numerous. They stated that over their houses of business, in their bills of parcels, and in all bills of exchange drawn or accepted by the partnership, the names of all the four partners were written at length; and denied that they had drawn any draft or check, except in those names; and they believed that no contract could be completed without its being known, and that in fact it was well known to all persons dealing with the partnership, that the Plaintiff was a partner. They admitted that about *April* last the Plaintiff had applied to them to use his name in their letters of business, and stated they had then informed him of the inconvenience of using four names. It was also sworn, that the Plaintiff had written letters and given receipts for the partnership in his own name, generally adding for "self and partners."

Mr. Wetherell and *Mr. West* moved for an injunction.

Mr. Hart and *Mr. Bickersteth*, contra.

The LORD CHANCELLOR.

There is only this point in the case now before me, which I wish seriously to consider, viz. that although
this

1820.

MARSHALL
&
COLMAN.

this Court will interfere where there is a breach of covenants in articles of partnership, so important in its consequences as to authorize the party complaining to call for a dissolution of the partnership, whether (and it is a matter that will deserve a great deal of consideration before it goes so far) it will entertain the jurisdiction of pronouncing a decree (for this is what is to be done in the cause in which this motion is now made) for a perpetual injunction, as to a particular covenant, the partnership not being dissolved by the court. There is one case which is constantly occurring, that of a partner raising money for his private use on the credit of the partnership firm; and the Court interferes then, because there is a ground for dissolving the partnership; but then the danger must be such, there must be that abuse of good faith between the members of the partnership, that the Court will try the question, whether the partnership should not be dissolved in consequence. But it is quite a different thing, and it would be quite a new head of equity for the Court to interfere where one party violates a particular covenant, and the other party does not choose to put an end to the partnership: in that way there may be a separate suit and a perpetual injunction in respect of each covenant (a); that is, a jurisdiction that we have never decidedly entertained. All this bill seeks is, a perpetual injunction against using any other than this particular firm and name; and the question would be, if very serious mischief were to arise from not using it, whether the party would not be obliged to frame his bill differently. I have no difficulty in saying, that where the members of a partnership contract by covenant, that the firm shall be A. B. C. and D., that it is a breach of that covenant for A. to sign those instruments to which

(a) See *Forman v. Homfray*, 2 Ves. & Bea. 329. *Harrison v. Armistage*, 4 Madd. 143.

the covenant refers, in the name of A. and Co.; but it is no less a breach of that covenant for D. to sign his own name, adding "for self and partners," because by these words it can no more be known who are his partners, than by the word Co.

1829.
MARSHALL
S.
COLMAN.

When partners enter into such contracts, the meaning and intent is, that, in the first place, it may be known to the world, for the benefit of each partner, that he is a partner in that concern, and also that, as between each partner and the world it should not be left to them to speculate who are really partners, or who are dormant partners, and so on: it is intended, that each individual may have the credit which belongs to his name, and may not be exposed to consequences which might arise from his name not being used. But it must be made out to be a case which goes further than this does, to entitle the Court to grant an injunction against the breach of such a contract; it must be a studied, intentional, prolonged, and continued inattention to the application of one party calling upon the other to observe that contract. Looking at the circumstances of this case altogether, recollecting that the application was only made by the Plaintiff in *April* last, and even admitting that some of the letters, as has been insisted, may amount to contracts binding on the Plaintiff, the question is, whether it was not known who were really partners? I do not mean to say that there has been such an exact performance of the contract as there ought to be, and these gentlemen will do well (if they mean to protect themselves from the interference of this Court) to use all the names in the concern, — they must do that, or the Court will be under the necessity of awarding an injunction, or dissolving the partnership.

Motion refused without costs.

1820.

ROLLS.
Dec. 4. 6.

THE ATTORNEY-GENERAL v. HINXMAN.

Devise of a house after the death of A., for the use of the master that might be appointed to a school for the instruction of poor persons in W., and a bequest of money upon trust to apply the interest in procuring a master and mistress for instructing poor children, and in keeping the school-house in repair, and to apply the residue of the interest to the poor.

Held, that the bequest to the school was void as being connected with the devise of the house; and the amount intended for that purpose being uncertain, the gift of the residue was also void. A bequest of money connected with a devise void by the statute of mortmain fails, though the devise is revoked by a subsequent conveyance or surrender. *Semble.*

JAMES HINXMAN, by his will, dated in *January* 1814, devised his messuage, or tenement and house, called late *Waldings*, to *Martha Brown*, for her life, if she should so long continue unmarried, and after her decease or marriage, he devised the said messuage or tenement and house to his executors, in trust, that the same might be appropriated to the use of the master that might be appointed to a school, for the instruction of poor persons belonging to the parish of *Week*, for so long a time as his interest therein should continue. He desired his executors, out of his personal estate, to put this house into decent and habitable repair; and, till that was done, *Martha Brown* was to be permitted to reside in the house in which he then lived. The will contained, in a subsequent part, the following clause:—

“And I do desire and direct, that my executors, hereinafter named, shall lay apart, from my personal estate, the sum of 2000*l.*, and invest the same in the purchase of stock, in the name of the minister, churchwardens, and overseers of the poor of the parish of *Week* aforesaid, upon trust, that they, the said minister, churchwardens, and overseers, do pay and apply the interest, dividends, and produce of so much thereof, as they may think necessary, in procuring a master and mistress, for instructing poor children in reading, writing, and needle-work, and bringing them up in the principles of the established church, and keeping the school-house in decent repair. And upon this further trust, that they do pay, apply, and distribute, the residue, if any, of the said interest, and

produce

Hutson } *Phillips*
Raynolds } 189

produce, after payment of the expenses of the said school, as aforesaid, unto and amongst such poor families and persons, parishioners of, and resident in *Week* aforesaid, at such times, and in such proportions, as the said minister, churchwardens, and overseers shall think proper."

1820.
The ATTOR-
NEY-GENERAL
v.
HINXMAN,

By a codicil, alluding to the will, as "minutes of instructions in writing for his will," he gave the residue of his estate and effects to *H. S. D. King*, and he gave to his executors, the sum of 1000*l.*, in aid of the sum of 2000*l.* he had directed to be appropriated for the endowment or purposes of a school for children, in manner in such minutes mentioned.

The house called *Waldings* was of copyhold tenure, held for three lives, and the testator had, previously to making his will, by deed dated in *June* 1811, covenanted to surrender it to the use of *H. S. D. King*, his heirs and assigns, upon trust, for himself for his life, and after his death, to the proper use of *H. S. D. King*, for his life and the lives for which it was held; *King*, by the same deed, covenanting to devote his time to the management of the testator's business. The testator surrendered the house pursuant to his covenant, the surrender being, as it was stated, subsequent to the date of his will. He died in 1814, and *King* was soon afterwards admitted. The present information was filed to have the 3000*l.* legacy applied to the charitable purposes directed in the will.

Mr. *Heald* and Mr. *Lovat*, for the relators.

The gift of the reversionary interest in the house is void by the statute of mortmain; but there is not such a connection between it and the bequest of the 2000*l.* and 1000*l.*, as to occasion a failure of the latter. They are

VOL. II.

T

contained

1820.

The ATTOR-
NEY-GENERAL
v.
HINKMAN.

contained in distinct clauses, not referring to each other, and without any direction that the school provided for by the second clause is to be held in the house given by the first. The surrender of this copyhold house after the date of the will, was a revocation of the devise. That clause is inoperative, and the will must therefore be read as if it were removed, in the same manner as if there had been a want of attestation. Then taking the second clause by itself, no objection can be raised to any of the purposes declared, except that of repairing the school-house, and that may be satisfied without coming within the statute: as a house may be given or rented, and a gift of money for the repairs of a house to be procured by any mode except purchase, is not void. But if the direction to repair were void, the gift would only fail *pro tanto*, and would take effect as to the maintenance of the master and mistress, and the distribution of the residue; as in *Attorney-General v. Parsons (a)*, where a gift of money for rebuilding, repairing, altering, or adding to the houses and grounds of a charity was sustained, except so far as regarded additions to the land. The cases of *De Costa v. De Pas (b)*, and *Adams v. Taysden (c)*, were also referred to.

Mr. S. F. Cooke, for the executors, mentioned the *Attorney-General v. Stepney (d)*, where the testatrix gave personal property to be expended, for the purpose of promoting Christian knowledge, in the purchase of religious books, which were to be kept in a house devised by her; and that charity was sustained as to the personal bequest.

Mr. Sugden and Mr. Moore, for the Defendant *King*.

For the purposes of construing the will with reference

(a) 8 Ves. 186.

(c) 7 Ves. 324.

(b) Amb. 228.

(d) 10 Ves. 22.

to this question, it is immaterial whether the devise of the house was revoked or not, for the Court cannot look beyond the instrument itself. If a legacy to a charity be charged on real and personal estate, it is never inquired, whether the testator was possessed of any real estate; it is enough that the bequest is void upon the face of the will. A clause relating to real estate contained in an unattested will, cannot be looked at, even for the purpose of collecting the intention; but that is not the case when it is rendered inoperative by matters *dehors*. But the point does not arise; for, as the surrender, which is supposed to have been a revocation, gave the house to *King*, and he also takes benefits under the will, he would be put to his election, and by electing to take under the will, and renounce his title under the surrender, the house would be brought again within the operation of the will.

1820.

The ATTORNEY-GENERAL
v.
HINXMAN.

The MASTER of the ROLLS.

Supposing the devise of the house to be revoked, and the gift of the money to be so inseparably connected with it as to stand or fall with it, it would also be revoked.

For the Defendant.

It comes to the question, whether the gifts are not so connected. The intention was to endow a school, of which this house was to be the site; he gives this house for the schoolmaster, and has not pointed out any other mode in which he expects a school-house to be procured: the second clause was not to constitute a separate charity independent of the first. Now the cases of *Attorney-General v. Goulding (a)*, *Attorney-General v.*

(a) 2 Bro. C. C. 428.

1820.

 THE ATTOR-
 NEY-GENERAL
 v.
 HENKMAN.

Whitchurch (a), Chapman v. Brown (b), Attorney-General v. Davies (c), and a late case of Adams v. Lembery, before the Vice Chancellor, establish the proposition, that a bequest of personal property, intended to be employed for charitable purposes upon premises, the devise of which is void by the statute of mortmain, must fail, as being connected with, and subsidiary to, the void devise. The purpose of establishing a school cannot therefore take effect, and the consequence is, that the gift over must also fail; it having been decided in Chapman v. Brown, and Attorney-General v. Davies, that a bequest of the residue of a fund, after an indefinite gift to purposes that are void by the mortmain acts, is also void from the impossibility of ascertaining what the residue would have been, if the prior purposes had been legal. In Attorney-General v. Parsons, the fund was given to purposes, some of which were bad and some good; there it might be applied in parts, or entirely to the good purposes. The difficulty here is, that the amount of the residue can never be known.

Mr. *Heald*, in reply, referred to *Henshaw v. Atkinson. (d)* In the cases cited on the other side, it was quite clear that the different bequests were intended for the same purpose, and then it must be admitted that both will fail. But the Court will, if possible, take such a view of the will, as, by disconnecting the clauses, to give effect to the charitable purpose. The house is to be appropriated to the master, and might have been intended for his residence only, and not for the school-house; and this seems probable, from its being devoted to him only, and not to the mistress, though she was to be equally concerned in the school. Another circumstance to be observed is, that the house was not to come to the use of

(a) 3 Ves. 140.

(b) 8 Ves. 404.

(c) 9 Ves. 555.

(d) 3 Mad. 306.

the charity till the death of *Martha Brown* ; in the meantime the school was to be conducted elsewhere.

1820.
The ATTOR-
NEY-GENERAL
v.
HINXMAN.

The MASTER of the ROLLS.

The object of this information is to obtain the declaration of the Court, that the bequests of 2000*l.* by this will, and 1000*l.* by the codicil, to charitable purposes, are good and valid, and a reference to approve a plan for their application.

The question may be considered rather as one of construction, than as involving any controverted point of law ; for it is admitted, that if the legacy be inseparably connected with the primary gift, which is a devise of land, and therefore void by the statute of mortmain, the legacy must also fail ; on the other hand, it cannot be denied, that if we could, in any way, separate the bequest from the devise, it might stand. This, I think, is the fair result of the argument on the law ; and, taking that to be settled, we have to consider whether this is a connected or a separate bequest in favour of a charity ; and though the Court would certainly feel a strong disposition to effectuate the purposes of the testator, yet, I do not know that it is inclined to refuse to parties the benefit of the statute ; for we must remember that it is the policy of the law which prevents these applications of property : it is a question between the statute on the one side, and the charitable design of the testator on the other.

The testator, after the death or marriage of *Martha Brown*, gives the house called *Waldings* to his executors, in trust, to be appropriated to the use of the schoolmaster that may be appointed. This is a disposition of the remainder expectant on the determination of the life estate, under which the master would be entitled to call

1820.

THE ATTOR-
NEY-GENERAL

v.
HINKMAN.

for the benefit and enjoyment of the house. It was given for so long a time as his interest should continue; it seems that it was a copyhold for lives, and I suppose might be renewed; thus it was to be permanently devoted to the use of the master. That devise is undoubtedly bad; whether it was or was not revoked, on the face of the will, it is bad.

It is said that what follows is distinct. It is a pecuniary gift for the general purpose of supporting a school; and the testator directs the application of the interest, without an apportionment of it, partly to procure a master and mistress, and partly to keep the school-house in repair. Upon this the question arises, what school-house does he mean? Is it that which is given to be appropriated to the use of the master; or does he refer to any house that may be procured by the trustees, or that may be given by some other person for the use of the school? If the case could be brought up to that of *Henshaw v. Atkinson*, before the Vice-Chancellor, where there were negative words showing the intention to be, what is contended for here, that the money should not be applied to purchase or keep in repair any real estate; if it appeared, as it did then, that the bequest was intended to form an auxiliary fund, to go in aid of other donations, on the supposition that some other person would give a house, we should then be relieved from the difficulty. But I am afraid we cannot carry it so far. The natural construction is, that he means the house, which is the subject of the first devise, to be appropriated to the use of the master; that house, it seems, was out of repair at the time, and afterwards it must necessarily require more repairs, for which he has thus provided. Part of this fund is to be appropriated to the master and mistress, and some undefined part is to be applied to the house; that being the case, it cannot be disputed, that the le-
gacy

gacy is so connected with the primary gift, that it must fail. It was a very fair observation that the school was to commence immediately, though the house would not come to the use of the master, till the determination of the tenancy for life; but that will not relieve the case from the objection, that part of the money is to be employed upon the house. If any part, in any event, is to be applied to an illegal purpose, it vitiates the whole. We cannot here separate it, as in *Attorney-General v. Parsons*; there the bequest was for rebuilding, repairing, altering, or adding to the alms-houses; the word *or*, giving a discretion to employ it in either way, and the Lord Chancellor thought that he was at liberty to confine it to the former alternative alone. But it is quite different here; no such discretion is given; the trustees would be bound, if the house was out of repair, to appropriate part of the fund to it. Then how much was to be thus applied?

I should be very glad if, though that sum is unliquidated and unascertained, the subsequent bequest of the residue could take effect; but the authorities shew, that when the first gift is to a void charity, and the quantity is undefined, the bequest of the residue fails. In *Attorney-General v. Davies*, the Lord Chancellor says, "It is a bequest of a residue, to be laid out in the first instance in land; and if all should not be exhausted, as it could not be consistently with his scheme, to be laid out upon these purposes, affording medical assistance, and for a chaplain in the almshouses; and all beyond that, if well given, is uncertainly given; and if the primary gift fails, the secondary gift being totally uncertain and fluctuating from time to time, the whole must fail." In *Chapman v. Brown*, the same point is thus put by the Master of the Rolls: "If it could have been reduced to any certainty, how much would have been employed

1820.

**The ATTORNEY-GENERAL
v.
HINKMAN.**

If an undefined proportion of a legacy is to be applied to a purpose void by the statute of mortmain, it vitiates the whole.
When the fund is applicable at discretion to several purposes, some of which are void and the others not, it will be confined to the latter.

Gift of the residue of a fund after the application of an undefined amount to a void charity, is void for uncertainty.

1820.
 The ATTOR-
 NEY-GENERAL
 v.
 HINXMAN.

by the executors for the other purposes, the residue ought to be employed under this last direction, viz. for charitable purposes generally. I have considered whether that can be ascertained by a reference to the Master to see how much would have been sufficient for this chapel; but, upon consideration, it is quite impossible to give any directions that would not be vague and indefinite to a degree almost ridiculous; an inquiry what they might have employed for building a chapel, without knowing what kind of chapel; the testatrix having given no ground to ascertain what kind of chapel; no locality. It is impossible to frame any direction that would enable the Master to form any idea upon it. If she had even pointed out any particular place, that might have furnished some ground of enquiry as to what size would be sufficient for the congregation to be expected there; but this is so entirely indefinite, that it is quite uncertain what the residue would have been; and, therefore, it is void for uncertainty."

On these grounds, I think that the bequest for the benefit of the school is so connected with the primary gift, that it falls to the ground; and the amount to be thus appropriated being unascertained, the gift of the residue, which depends on that, is also void.

HIS Honour doth declare, that the bequests of 2000*l.* by the will, and 1000*l.* by the codicil to the will of the testator *J. Hinxman*, for the purposes therein and in the pleadings mentioned, are void; and that the sums of 1000*l.* and 2000*l.* fall into the residue of the said testator's estate; and it is ordered that all parties be paid their costs of this suit out of the testator's estate.

Reg. Lib. 1820, fo. 1013.

1820.

WHITTELL v. DUDIN.

Rolls.
Dec. 8.

HENRY WHITTELL, by his will, dated 15th December 1804, gave to his executors 2000*l.* 3 *per cent.* consols, and 1000*l.* 4 *per cents.* upon trust, for the separate use of his wife for her life; and after her death, the two sums were to sink into the residue of his estate. He also gave to his wife a leasehold house, with the use of his household goods, furniture, plate, linen, and china, for her life; all which, on her death, were to fall into the residue. He then gave 1400*l.* 3 *per cent.* consols, upon trust, for his son *John Whittell*, for his life; and after his death, to fall into the residue; and another sum of 1400*l.* 3 *per cent.* consols, upon a similar trust, for his son *Michael Whittell*. He gave 600*l.* 3 *per cent.* reduced, and 200*l.* 3 *per cent.* consols, upon trust, for the separate use of his daughter *Mary*, the wife of *Charles Cumming*, for her life; and after her death, to fall into the residue; he gave three sums of 600*l.*, 1400*l.*, and 300*l.*, 3 *per cent.* reduced, upon similar trusts, for his three daughters, *Winifred*, the wife of *W. Powell*, and *Charlotte*, the wife of *Henry Dudin*, and *Elizabeth*, the wife of *Benjamin Ellis*. He gave 400*l.* 3 *per cent.* reduced, in trust to pay the interest and dividends to his son *George Whittell*, for his life; and after his death, unto and equally between and among all and every the child and children of the said *George Whittell*, share and share alike. He next gave to his executors a sum of 1400*l.* 3 *per cent.* reduced, upon trust, to lay out and expend the sum of 30*l.*, part of the interest and dividends, annually, upon the clothing and other necessities of his son *W. H. Whittell*; and directed, that the remainder of the interest and dividends of the said stock, with the said stock itself, and any eventual

Gift of residue to be equally divided between the testator's wife, sons, and daughters; subject nevertheless as to the shares of the daughters, which were to be placed in the funds in the names of trustees; the interest to be paid to them for their lives for their separate use, and after their deaths the testator gave the shares, to the interest of which his daughters should have been entitled for life, to their children equally, with benefit of survivorship. Two of the daughters having survived the testator, died without children. Held, that their representatives were entitled to their shares.

Ring } 2 Beav Kes v Lord Dunsany share, 30 Warr 521
Hardwick } 357

1820.
 WHITTELL
 v.
 DUDIN.

share of his said son in any of the legacies given by his will, or in the residue, should be allowed to accumulate until he should attain the age of twenty-four years, and should then be paid to him ; if he died under that age, without lawful issue, it was to fall into the residue. He devised his freehold and leasehold estates to his executors, upon trust to sell ; the produce of the sales to form part of the residue of his estate and effects, of which he made the following disposition :

“ And as to all the rest, residue, and remainder of my estate and effects whatsoever and of what nature or kind the same may be, I give and bequeath the same and every part thereof, unto, and equally between and among my said wife and my said sons and daughters ; subject, nevertheless, as to the parts and shares of my said daughters respectively, which are to be placed and continued in the funds on government securities, in the names of my said trustees, or the survivors or survivor of them, and the executors and administrators of such survivor ; and the dividends, interest, and produce thereof from time to time respectively paid into the respective hands of my said daughters for and during their respective natural lives, and to and for their own respective, sole, and separate use and benefit, to the intent and purpose that the same, or any part thereof, shall not be liable to the debts, controul, disposition of their or either of their present or any after-taken husband or husbands, but be and remain an unalienable provision to and for them and to and for their and each of their respective, sole, and separate use ; and that the receipt and receipts of my said daughters respectively from time to time shall be sufficient discharge or discharges to my said trustees, or the person or persons paying the same ; and from and after the decease of each and every of my said daughters respectively, I give and bequeath the
 part

part and share to which my said daughters respectively shall have been entitled, to the interest, dividends, and produce for life as aforesaid, unto the respective child or children of such respective deceased daughter, in equal parts, shares, and proportions, with benefit of survivorship, in case of the death of any or either of them under the said age of twenty-four years, without lawful issue, and if but one such child, then to such only child."

1820.
 WHITTELL
 v.
 DUDIN.

The testator, by a codicil, directed that the interest and dividends of the share or shares to which the child or children of his daughter *Elizabeth* should become entitled, should be paid to their father, to be applied towards their maintenance, till they should attain the age of twenty-four years.

The testator died in *March* 1805, and the different legacies bequeathed by his will, as well as the residue, were invested in the names of his executors. Two of his daughters, *Charlotte Dudin*, and *Winifred Powell*, died some years afterwards, without having had any issue; and their husbands took out administration to them. The bill was filed against them and the executors, by the other sons and daughters of the testator, and the children of one who had died, being also the next of kin of the testator; and the question was, whether the shares of the residue, to the interest of which the daughters who had died without issue, were entitled for their lives, passed to their husbands as their representatives, or to the Plaintiffs, as undisposed of.

Mr. *Agar* and Mr. *Roupell*, for the Plaintiffs.

The testator has given a share of the general residue for the separate use of each daughter, for life; after their deaths,

1820.
 WHITTELL
 v.
 DUDIN.

deaths, these shares were to be divided among their children, if they had any; but he has made no provision for the event of their dying without issue; that event having now happened, the shares are undisposed of. The gift to the children having failed for want of objects, the effect is the same as if it had been inoperative for any other reason, *e. g.* as if it had been void by the statute of mortmain; it must go to the next of kin. His describing these shares as those, to the interest of which his daughters would be entitled for life, proves that he did not conceive himself to have given them an absolute interest; and the husbands are excluded with great anxiety.

Mr. Horne, and Mr. Barber; Mr. Wetherell, and Mr. Pemberton, for the Defendants.

The first words of this residuary clause, taken alone, give the shares absolutely; that which follows is only designed to preserve them from the power of the husbands, and to secure the benefit of the bequests to his daughters and their children. Words divesting an estate, must be as clear as those conferring it. The expressions, "subject, nevertheless," &c. cannot therefore take away entirely the effect of the preceding clause, and can only abridge the interest to the extent of the purposes declared. He clearly did not mean to die intestate, as to any part of his property, and he was not likely to have overlooked the probability of his daughters not having children. They cited *Smither v. Willock (a)*, and *Galland v. Leonard. (b)*

The MASTER of the ROLLS.

I cannot say that I consider this as a will, that on either construction is entirely free from doubt; and I confess that the impression on my mind varied in the progress of

(a) 9 Ves. 233.

(b) 1 Swan. 161.

the argument. It is not very correctly framed ; but we must endeavour to find out, as well as we can, the intention so imperfectly expressed.

1820.
 WHITTELL
 v.
 DUDIN.

The latter part of the residuary bequest is not to be looked upon as the sole and original bequest to his daughters and their children, but as a qualification annexed to another gift ; and we must therefore consider, not only what the testator intended to become of it, in the event of the daughters having children, but also what he intended in the other event of their not having any ; for we must suppose, that he looked forward to both events. The daughters were all married at the time, and two of them had no children ; he can therefore hardly be imagined, not to have contemplated the chance of their dying without any. The question then is, whether he intended to leave this event unprovided for, or to cover it by any of these expressions ; and we must not impute intestacy to him, if the event was one that could not have escaped his notice, and the words are sufficient to extend to it.

Now, consider the general plan of the will : he enumerates the objects, giving to each of them a life interest in a portion of his personal property, providing liberally for his wife, and for the children, in different proportions ; which might probably arise from his having unequally provided for them before. As to the daughters, the legacies were given to trustees, for their separate use, guarded in the same manner as their shares of the residue, to form an inalienable provision ; and, with respect to all, except two of the sons, he gives them the interest of the legacies for their lives ; and afterwards they are to fall into the residue.

The plan of the disposition, therefore, was to give separate

1820.

WHITTELL

v.

DUDIN.

parate parts to each for life, and then to reserve the residue, consisting of the rest of his property, together with the accumulated produce of those parts. It is said, that there being a residuary clause shows that the testator could have had no intention of dying intestate as to any thing; but, I think, that does not follow; for where it is given in parts, there may be an entire disposition, comprising every article of his property, but which, though complete as to the subjects of gift, may be incomplete as to the persons to take the different shares.

With respect to the residue, he begins by declaring a general purpose of equality; he gives it unto and equally between and among his said wife and his said sons and daughters. Stopping here, (not in the construction, but for the sake of observing the intention,) it is evident that the sons and daughters were all to enjoy equal shares, without any distinction between the sexes; none taking a larger proportion, or a larger interest, than the others. Then, if the design that was uppermost in his mind was that of making all participate equally, having made up before for any previous inequality of provision, one thing is clear, that he meant to give an absolute interest to the widow and the sons; and if all were to be treated alike, the idea was, that the daughters were to take the same interest. It might have been that they were to be equal in amount, but not in interest; but *prima facie*, equality in both respects appears to have been intended.

These words follow, "subject nevertheless, &c.;" and it is not a mere verbal argument, that these are words frequently accompanying an absolute gift; as subject nevertheless, to the payment of a sum of money or to any other qualification. He might think it proper, with respect to the daughters, to accompany the legacies with a bequest to trustees, not to break in upon

the entirety of the interest meant for them, but to prescribe a different mode of enjoyment. In all the former gifts to the daughters, he had interposed trustees; he had not done so in the first part of this clause; he here takes up the idea that had governed him in the prior part of his will, "subject, nevertheless, as to the parts and shares of my said daughters respectively, &c.;" he still speaks of them as the shares of the daughters, and treats them as sums which are to be taken out of and separated from the residue; they were to be laid out in the names of trustees, being, as he has described them, the daughters' shares, to form a provision for them during the coverture; and, after their deaths, to go to their children, if there were any. But that does not exhaust it; it only meets one event; what was to become of it, if there were no children? Why has he not said, that the daughters are to have the same absolute interest as the sons; and that it should be laid out in the funds for them? He meant that the husbands should not take it; that they should not have it in their power to deprive the children of their successions; that is the qualification subject to which it is given to the daughters. It is difficult to conceive it possible that the parent of two married daughters, having at that time no children, should take it to be certain that they must have children. And how can we suppose, equality being his object, that he meant their shares, if they died without issue, to devolve upon the others. Could he have intended such a disposition, destroying all equality; for the brothers had their shares absolutely, and at all events; the sisters would have it absolutely, if they had children; for giving it to their children, to whom they ought to leave it, is to be considered the same as giving it to them; but if they had no issue, they were only to have a life-interest. I think it improbable that that was the intention; but we are not to go on probabilities; the Court

1820.

 WHITTELL
 &
 DUDIN.

1820.
WHITTELL
v.
DUDIN.

Court is bound to reconcile, if it can, both parts of the will. We can reconcile them, if we suppose the shares to be given equally, accompanied with a qualification that is not inconsistent: by the other construction we cannot, for it would convert that which purports to be an absolute gift into a gift for life.

The two cases cited do not come up to this; the only way in which they apply, is by showing that an absolute bequest, accompanied by a gift over on a certain event, is not necessarily cut down to the time of the event happening, as it may be only subject to the contingency of its happening within a certain period. The comparison to the case of a bequest void by the statute of mortmain, does not apply; for if it had been what without the statute would have been a complete disposition, the idea of his having contemplated any other event would have been excluded. The difference is, that the gift to children may or may not take place, according as there are or are not any born, and is not an entire disposition at all events.

I think that this is the case of a parent professing in the first part of the sentence, to treat all his children equally with respect to the residue, and that the subsequent part is not inconsistent with that design, but is only a cautionary provision, to preserve the benefit of the bequest to the daughters and their children.

Reg. Lib. B. 1820, fol. 92.

LECHMERE v. BRASIER.

1821.

Dec. 8. 9.

THE bill in this cause was filed by the simple contract creditors of *S. Brasier*, who died intestate in the year 1813, against his administratrix and heir-at-law, who was an infant, and a second mortgagee of his real estate, for payment of their debts, alleging that the deceased was a trader subject to the bankrupt laws at the time of his death. Witnesses were examined with the view of establishing this allegation, which, however, did not appear to have been satisfactorily made out.

On the 2d of *July* 1816, a decree was made, directing the usual accounts to be taken of the intestate's debts and personal estate, and the latter to be applied in a course of administration; and also ordering the appointment of a receiver of the rents, and a sale of the real estate, and the money to be paid into the bank, with liberty to all parties to apply.

The estates were sold on the 24th of *October* 1818; the Master, on the 31st of *October*, reported Mr. *Lead* the purchaser of lot 1, and his report was confirmed on the 28th *November* 1818.

In *May* 1820, a motion was made, that the purchaser should pay his purchase-money into Court, which was resisted, amongst other grounds, on that of the irregularity of the decree; and the motion was refused with costs.

The original cause, without any notice being given to the purchaser, was then reheard, and on the 1st of *July* 1820, the former decree was altered, by directing a reference to the Master to inquire whether the intestate was, at the time of his death, a trader within the

Purchaser of estates sold under a decree, discharged, on motion, from his purchase, upon error in the decree being shewn, though the parties are proceeding to rectify it.

Whether he is entitled to his costs. *Quare.* To a bill for sale of real estates by simple contract creditors of a trader against his heir, an infant, the parol may demur. *Semble.*

VOL. II.

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intent

Price } *Mr. Ho*
Carver } *160*

Chamberlain / *10*
Lee *548*

1821.

LECHMERE

v.

BRADSHAW.

intent and meaning of the several statutes relating to bankrupts.

The purchaser, Mr. *Leu*, moved before the Vice-Chancellor, that it might be referred to the Master to tax him his costs, occasioned by the confirmation of the report of the purchase, and the investigation of the title; and that the Plaintiffs might pay the same; and that he might be discharged from his purchase. His Honour directed the motion to stand over, and come on with the cause on further directions. The motion was now renewed.

Mr. *Horne* and Mr. *Parker* in support of it, argued, that the purchaser ought to be relieved from his purchase, inasmuch as the original decree, which was the foundation of his title, had fallen to the ground, and that, being no party to the decree, he was entitled to his costs. The second decree does not declare the trading, or direct a sale; and the purchaser cannot be kept in suspense till a further decree is obtained.

Mr. *Shadwell* opposed the motion, on the ground, that if there was error in the first decree, it had been rectified; and in a short time a complete decree for a sale would be obtained; and that, as it did not appear that a good title could not be made, the Court would not so determine without a reference; and if a title was procured before the report, it would fall within the common rule. As to the other point, he contended that a person purchasing estates under a decree, to which it turned out that a good title could not be deduced, always paid his own costs.

The LORD CHANCELLOR.

The form of the second decree is open to objection, in directing a reference as to the fact of trading; it is also wrong in not reversing the first. The utmost that you can do in such a case as this, where
the

the heir-at-law is an infant, and it is not made out, both in point of allegation and proof, that the deceased was a trader, is, to take a decree much in the same form as when the will is not proved, in which case you take a decree for an account of the personal estate, with liberty to exhibit interrogatories to prove the will; you cannot prove it on a reference; the Court does not refer it to the Master to see what is the effect of the evidence, but the declaration that the will is well proved, is made by the Court itself upon reading the evidence; however, it is clear that the decree, in its original form, was wrong. (a).

1821.
LECHESTER
v.
BRASIER.

Will of real estate not to be proved on a reference before the Master.

With respect to this motion, I must say, that I will not extend the rule which the Court has adopted, of compelling a purchaser to take the estate where a title is not made till after the contract, to any case to which it has not already been applied. The rule has, in many instances, been productive of great hardship; and I feel particularly unwilling to extend it to this case, where, to entitle these simple contract creditors to a sale, they must prove a fact which subjects the purchaser to some hazard, whatever it may be. Let the purchaser therefore be discharged from the purchase. As to costs, the rule in general is, that the suitor must pay for the mistakes of the Court. It is true, the purchaser was not a party to the suit; but still the other parties have been misled by the Court: they have been acting on its judgment, and it requires consideration whether they should be made to pay the costs.

The rule of compelling a purchaser to take the estate where a title is not made till after the contract, not to be extended.

Mr. *Horne* then consented, upon being discharged from the purchase, to give up the costs.

(a) On reference to the original decree, it appears, that the second mortgagee, who was a party to the suit, had a power of sale, and it was expressly stated that the receiver was appointed, and the estates were directed to be sold with his consent.

1821.

LECHEMERE

v.

BRASIER.

Dec. 9.

The LORD CHANCELLOR.

It occurs to me, that, in this case, the decree ought not to have been for a sale of the estate during the infancy of the heir, as the parol might demur. I have been looking into some cases before Lord *Thurlow* and Lord *Kenyon*, of which I have got manuscript notes, and they held, that when real estate descends to an infant heir-at-law, and bond creditors file a bill in this Court for satisfaction of their debts, the sale cannot be till the heir comes of age. It will depend on the statute (a), whether, on a bill by simple contract creditors, the decree is not to be the same as in that case; it is clear, that by that statute, the simple contract creditors are put on the same footing as specialty creditors were put by the statute of *William and Mary*.

Unless the practice of the Court has been altered *sub silentio*, without any one's attention being called to it, the rule is, that the parol demurs in equity as well as at law, and then the question is, whether the practice can be altered in that manner. It comes to be a matter of great importance to purchasers.

In *Sweet v. Partridge* (b), of which I have a note, the course which Lord *Kenyon* took was, not to deny the application for a receiver; but all that he would do, notwithstanding his dislike of the parol demurring, was to have the rents and profits brought into Court; whether that was right or wrong is another question. (c)

(a) 47 Geo. 3. c. 74.

(b) 2 Dick. 696. 1. Cox, 453.

(c) As to the cases in which a sale is prevented by the parol demurring, see *Scarth v. Cotton*, *Cas. Temp. Talb.* 198. *Chaplin v. Chaplin*, 3 P. W. 568. *Uvedale v. Uvedale*, 3 Atk. 117. *Mould v. Williamson*, 2 Cox, 386. In *Powell v. Robins*, 7 Ves. 209. 211. the doctrine seems to have been applied where the infant was a devisee; but according to *Plasket v. Beeby*, 4 East, 485. it is confined to the case of an heir.

1820.

December 9.

ATTORNEY-GENERAL v. BERKELEY.

THIS was an information, filed at the relation of the parish officers and some of the inhabitants of *East Moulsey* in the county of *Surrey*, for the purpose of setting aside a lease for ninety-nine years, granted in the year 1789, of certain lands called the *Hale*, and *Hale Platts*, situate in the parish, and for the delivery of all deeds, &c. and a case and opinion, in the possession of the Defendants, relating thereto. The information stated, that the lands in question had been originally granted for the benefit of the poor of the parish, and had been let from time to time by the parish officers for upwards of one hundred years: the Defendants, as they admitted by their answer, or their ancestors, had been the lessees of the lands which were intermixed with lands of their own, and had paid rent to the officers since 1767. Under a late inclosure act, which had been solicited by the Defendants, the *Hale* lands were allotted to them, as part of the waste and common field lands, in respect of their rights, as inappropriate rectors, and, in consequence, they refused to continue to pay rent.

Opinion of counsel ordered to be produced, where it was taken by a tenant, with reference to his landlord's title, and where the case was stated for the benefit of both parties.

It was further stated, that disputes having existed between the parish and Sir *T. Sutton*, the lessee under whom the Defendants claimed, respecting the right to the above land, a case upon the subject, drawn up by *H. Swan*, then one of the churchwardens, and approved of by *Sutton*, or his solicitor *Ashe*, was submitted to Mr. Serjeant *Hill* in the year 1788, who refused to answer it, in consequence of no solicitor's name appearing on it, and that the name of *Ashe* was then indorsed on the case, which was returned to the Serjeant, who gave an opinion in favour of the title of the parish. Soon afterwards the lease for ninety-nine years was obtained, and, at the same time, a previous agreement entered into by *Sutton* for a twenty-one years' lease

1820.

ATTORNEY-
GENERAL
v.
HARRIS.

was cancelled. It was also alleged, that the fee on the case was paid by the parish officers, and that it, as well as the opinion, were retained by *Swan* until he left the parish, when he delivered them, with other documents, to *Sutton*, who undertook to produce them to the officers of the parish when required.

The Defendants, by their answer, represented, that the *Hale* lands were parcel of the manor of *Mondsey*, lately purchased by them from the crown, and had formerly been subject to certain rights of commoning; and that the practice of turning in cattle having been discontinued, the parish had for many years wrongfully let the lands, and received rent instead. They insisted that they had acquired an absolute title by the award made under the inclosure act, the commissioners being authorized to determine what lands should be inclosed. They believed, that a case had been stated by *Able* for the opinion of Mr. Sergeant *Hill*, and that Sir *T. Sutton* retained possession of both; and they admitted, that they and the lease for ninety-one years were now in their possession, and that the opinion was in favour of the parish; but, except as above, the Defendants were altogether ignorant of the disputes, and the other circumstances respecting the case and opinion mentioned in the bill.

A motion was now made for the production of the lease and the case and opinion: no opposition was made to it, except as to the opinion.

The *Attorney-General* and Mr. *Pepys*, in support of the motion.

The case having been stated for the joint satisfaction of both parties, we are entitled to see the opinion. The information states, that these documents belong to the parish,

parish, and are part of their property, and the recovery of them is part of the relief prayed. The Defendants do not allege that they have any title to the opinion. They believe the case to have been stated by *Ashe*, but they do not say that it was on the part of those under whom they claim. This, therefore, distinguishes the present case from that in which a Defendant swears that he made the statement and took the opinion of counsel for himself; there, the production of the opinion cannot be compelled.

1820.
ATTORNEY-
GENERAL
v.
BRANLEY.

Mr. *Shadwell*, for the Defendants, admitted that the production of the lease and case could not be resisted; the question as to the latter had been set at rest by the decision of the House of Lords, in *Radcliffe v. Davey*, in 1780: (a) But with respect to the opinion, the Plaintiffs, he contended, were not entitled to the production of it, as there was no evidence that the case was stated by or for the parish. The Defendants, of course, could not state the particular circumstances under which it was drawn up; but the inference, as far as they are stated in the answer, is, that the opinion was taken by *Sutton* alone.

The Lord Chancellor.

No opposition, I understand, is made to the production of the lease and case. I agree that it is another thing to order the production of the opinion; but, nevertheless, I am of opinion, that the Plaintiffs have in this case a right to see it also. Sir *T. Sutton* held as tenant of the parish, and wherever a person obtains possession as tenant, he is to keep it under an obligation to preserve his landlord's title, and being under that obligation, if he intermixes the lands, or does other acts to his landlord's prejudice, they will be set right at the expense

(a) 5 Bro. P. C. Toml. Ed. 538. Vide also *Richards v. Jackson*, 18 Ves. 472.

1820.

ATTORNEY-
GENERAL
v.
BERKLEY.

of his own property. Being in that possession, and though some of the expressions are not very clear, I am satisfied, taking the whole together, that the case and opinion, if they do not belong to the parish, were stated and taken for the mutual benefit of both parties, and that the opinion ought, therefore, to be open to the inspection of both.

Reg. Lib. A. 1820, fol. 139.

1820.

April 30. 15.
Nov. 13. 15.
17, 18. 30,
21. 28.
Dec. 11.

The Incorporated Society v Richards & son & J. & R. & Rep.
ATTORNEY-GENERAL v. MAYOR OF
BRISTOL.

By deed, a corporation, to which a sum of money has been given for the purposes mentioned in the deed, and to the intent that it might be laid out in the purchase of lands of the clear yearly value of 120*l*. and more, covenants to pay thereout annual sums of nearly the same amount to certain charities in rotation; the corporation itself being one of those charities, there being no express gift of the surplus, and the decrease and subsequent increase of the rents being in certain events provided for; held, that the other charities were not entitled to call for a distribution of the increased rents.

THE object of the information and bill filed in this cause, was to obtain a decree declaring, that the increased rents of certain estates, out of which, in the year 1566, annual sums of a given amount were covenanted to be paid by the corporation of Bristol, to certain charities in rotation, ought to be applied for the benefit of those charities. To this information and bill, the mayor, burgesses, and commonalty of Bristol, and their chamberlain, put in a general demurrer, which was overruled by his Honour the Vice-Chancellor. (a)

The Defendants having appealed from the order overruling the demurrer, the relators moved before the Lord Chancellor for the appointment of a receiver.

In the course of the arguments in support of this motion, his Lordship expressed considerable doubt, whether, after an enjoyment of more than two centuries, under a practical construction of this deed, the Court, pend-

Att'y General } *IK*
Sanctis } *303*
The Att'y Gen'l } *300 IK*
downers } *540-*

(a) Vid. 3 Madd. 319.

Att'y Gen'l } *2. 27.*
Crucis College } *. 155.*
vid. p. 319.

ing
The Corp } *5. 15.*
Company } *5. 15.*
James S. M. & Co.
The Trustees

ing an appeal from a contrary judicial construction, would change the possession, and remove persons who had so long enjoyed it, and particularly where more than twenty bodies, seeing that construction acted upon, *de anno in annum*, and interested in changing it, had never interfered. His Lordship also remarked, that the decision on this motion involved the merits of the appeal, and expressed his disapprobation of a practice which was productive of great injustice to other suitors, whose appeals had been depending six or seven years, and who had therefore a prior right to be heard.

1820.
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 ATTORNEY-
 GENERAL
 v.
 MAYOR of
 BRISTOL.

As the discussion, however, had proceeded to a considerable length, the appeal, in this instance, was allowed to be advanced : it was accordingly set down, and came on now to be heard.

The statements contained in the information, and the prayer of it, together with the deed, on the construction of which the question in the cause depended, are to be found at length in the report in 3 *Madd.* (a) and it is therefore unnecessary to repeat them. It was mentioned at the bar that an information similar to the present had been filed in the year 1713, and that an answer had then been put in by the corporation of Bristol, by which it ap-

(a) In this report the deed is stated in the words in which it was set forth in the information, and in the material parts it corresponds almost verbatim with the original deed — the first covenant for the payment of the annual sums of 104*l.* to York and the other cities and towns, provided that they should be paid at the Common Hall of the Merchant Taylors in London, between the hours of two and six in the afternoon ; the other covenants for payment of those sums were general, as stated in the information. In p. 332 of the report, "forfeit, *loss*, and pay," should be substituted in the 22d line for "forfeit and pay;" and in p. 333 "by any sudden misfortune," in line 6, for "by misfortune;" and in p. 354 "of the lands," in the 2d line, for "and lands;" and in the 3d line, "*able*," for "liable."

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1820.

Archerd
General

Mayor of
Bristol.

proved, that the lands producing the 76*l. per annum* had been purchased for 800*l.*, but that the increase of the rent, in 1713, was so inconsiderable, as to give little encouragement to prosecute the information. The judgment of the Court, however, was given, without any reference to this fact, or to the statements in the information, and was expressly confined to the question, whether, upon the construction of the deed alone, the information could be sustained.

Mr. *Hart*, Mr. *Wingfield*, and Mr. *Gerratt*, for the Appellants, in support of the demurrer.

The first question to be determined is, whether this instrument is to be dealt with as one of contract or gift; and if the latter, whether it is one of those cases in which the Court will act upon those peculiar principles of inference which it is in the habit of applying where the fund is given for charitable purposes. This deed contains intrinsic evidence, that the corporation of *Bristol* was not to be merely a trustee. It commences without any recital, and witnesses, that the mayor and corporation of *Bristol* had received 2000*l.*, of which they acknowledge themselves, *satisfied, contented, and paid*; the two first expressions are rather singular, if they were to be merely trustees. They were not bound to lay out the whole 2000*l.* if lands producing 120*l. per annum* could have been found for less; if land of that value could not have been purchased for that sum, they must have supplied the deficiency themselves. The purchase was to be made in four years; in the interval they were bound to pay 100*l. per annum*, although 70*l.* only had been then purchased; in the 9th year 200*l.* must have been paid, and there are several expressions showing that the payments were to be made, without regard to the amount of the rents. The deed then states, that the rents

1826.

ARTURRY-
GENERAL
v.
MAYOR of
BRISTOL.

rents of the lands purchased, and to be purchased, are to be applied to the uses aftermentioned, and to no others; and it is contended, that these last words exclude *Bristol* from all beneficial interest: if all the rents are to be so applied, there is a radical defect in the deed, because 20*l.* in some, and 16*l.* in other cases, are undisposed of; but the other construction gives a rational meaning to those words, and shows that they were only introduced to prevent any application that would contravene the uses mentioned in the subsequent part of the deed. During the first eight years, and in the year in which *Bristol* is to take in rotation, there is no specific provision made for its trouble; of course, the corporation could only superintend the distribution by their agents or trustees, who must be paid, and a gift to the inhabitants of the city is quite a different thing from a gift to the corporation. In the case of all the other corporations, there is an express provision of 4*l.* for their pains and trouble; *Bristol* was the principal object of the donor's bounty, and has much more trouble than all the other corporations; but unless it takes the surplus, it will have no remuneration whatever, while every one of the other corporations has a sum allowed for the duties imposed on it. The clause with respect to the penalties is most important: can any case be cited in which a trustee ever subjected himself to large forfeitures, and that without inquiring whether the non-payment arose from his own neglect, or a deficiency in the funds? But in the present case, except in certain events, the trustee would be bound to make the payments, although the fund may be deficient. From the limited jurisdiction of courts of equity at the time this deed was executed, no relief could have been obtained from these penalties. Sir *Thomas Moore* was the first person who relieved against the penalty of a bond. Besides, in the present case, a third interest intervenes, viz. *St. John's College*; and


1820.

ATTORNEY-
GENERALv.
MAYOR OF
BRISTOL.

and there is no instance of relief having been given under those circumstances.

The clause respecting fire, &c. is very peculiarly framed, and shows, that it was intended that the corporation should be beneficially interested; it gives them protection, although, without it, if they had been trustees, they would have been entitled to be indemnified; they would only have had to have shown that they had used due diligence in collecting the rents; but they are in this deed clearly liable to make good the payments, whatever may be the expences of recovering the rents, and although the lands are untenanted, and the tenants insolvent. The 104*l.*, in case of fire, &c. is to be made up, not out of the former surplus rents received by the corporation, and which would have been the case if they had been trustees of them, but out of future rents; and the donor makes no provision for the application of the surplus. Then follows a clause imposing on the corporation of *Bristol* and *St. John's College* the duty and burthen of visiting the other towns and cities at stated periods, in order to see that the 104*l.* is duly applied. *Bristol* is to have no remuneration for this trouble, unless it is entitled to the surplus. It is true, *St. John's College*, unless the forfeitures are considered as a compensation, has nothing given to it; but then, it must be recollected, that the college, as is mentioned in the deed, was founded by *White*, and derived all its possessions from his bounty. The deed concludes with a covenant to pay the annual sums, without any reference to rents and profits. So far from this covenant giving greater facility in the recovery of these sums, as is suggested, the contrary is the case, because, if an action were brought on the first covenant, and the corporation failed in proving that it had been performed in any one particular,

cular, the Plaintiffs must recover. Sir *Thomas White*, though not a party, afterwards executes and adopts this deed, being a more deliberate recognition of its containing his intentions, than if he had actually been named as a party. Taking the whole of its provisions together, the corporation must be held to have contracted for the purchase of the surplus, in consideration of the covenants which they entered into. It is impossible that the other corporations could have been intended to take the residue, when part only is given to them. What sort of scheme would be proposed as respects *St. John's College*, which is to have various forfeitures? The payments to them must be increased, as well as those to the other charities.

1820.

 ATTORNEY-
 GENERAL
 v.
 MAYOR of
 BRISTOL.

Then it is contended, that in cases where charity is one of the objects of the trust, it is incumbent on the donee to show, that it was intended that he should take beneficially. But this is not the case; no favour can be shown to charity, and the same construction must be adopted as in the case of an individual, unless it falls within the principle of those cases in which the Court has taken upon itself to say, the trust is sufficiently explained without words of express gift. Of these cases there are only two classes; one in which a testator, in distinct terms, or by introductory words expressive of his intention, has given the whole estate for charitable purposes; and the other, in which that intention has been considered as expressed, by a gift of the actual amount of the rents at the time. In the present case, the donor has not declared any intention of giving the whole, and he has only given part of the rents, and it has never been contended in the case of a charity, that a gift of part, without something more, was a gift of the whole.

In

1820.

ATTORNEY-
GENERAL
v.
MAYOR OF
BRISTOL.

In the cases of the *Thetford School* (a), *Sutton Coldfield* (b), the *Attorney-General v. Johnson* (c), the whole profits, or the value of the land at the time, were given. The case of the *Attorney-General v. Mayor of Coventry* (d), to which this has been assimilated, is altogether different. Many of the reports of it are very inaccurate; but it clearly appears, that the whole 1400*l.* was the money of *White*, the whole of the existing rent, 70*l.*, was distributed; the trust was to pay the rents, not to pay certain sums out of the rents, and a remuneration is expressly given to the *Merchant Taylors' Company* and the corporation of *Coventry*, for their trouble and superintendence. The case of the *Attorney-General v. Arnold* (e) belongs to the other class, and went upon this principle, that the testator, having declared that all his lands should go to charitable uses, excludes the presumption of any other intention, and the Court, although the whole income is not distributed, will, in favour of charity, supply the defect. The *Attorney-General v. Touna*, or the *Haberdashers' Company* (f), falls within the same principle. To bring this within the reason of the two last cases, the relators are bound to show a clear and distinct dedication of all the profits of the land to charitable purposes; but whether this deed be considered as one of contract or trust, or as a mixture of each, there is nothing from which an intention to distribute more than 104*l.* to charitable purposes can be collected. The recital expresses, that the 2000*l.* was given "as well for the benefit and commodity of said city of *Bristolwe* and inhabitants of the same, as also for the advancement of commodity of other cities and towns hereafter speci-

(a) 8 Co. 150. *Duke's Ch. Us.* 71. P. C. 280. 2 Bro. P. C. 236.

(b) *Duke* 68. 10 Co. 31. 7 lb. 255. *Tom.* 21. 3 *Mad.* 553.

(c) *Ambl.* 193. (e) *Show*, P. C. 22.

(d) 2 *Vern.* 397. S. C. *Colles* (f) 2 *Ves. jun.* 1 S. C. 4 Bro. Ch. Ca. 103.

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fied;" intending to give a benefit to the city of *Bristol* distinct from that given to the inhabitants of the same and the other cities. Here there is no general charitable purpose declared; and, indeed, the word charity does not occur in any part of the deed. It is not necessary that the corporation should show an express gift to themselves. In *Hill v. the Bishop of London* (a), it was contended, that a devise of an advowson to one, desiring her to sell it to certain colleges, converted the devisee into a mere trustee; but Lord *Hardwicke* held, that it was only an injunction to enjoy the property in a particular manner: so here the covenant as to the land must bear the same construction. The present case has no analogy to the cases above-mentioned; it falls within the principle of the *Catherine Hall* case (b), and is one of those in which, subject to certain specified outgoings, the corporation, as donee, takes the surplus; which, in the present case, there is the clearest evidence of intention was meant to be given to them, as a compensation for the burthensome duties they have undertaken.

1820.
ATTORNEY-
GENERAL
v.
MAYOR of
BRISTOL.

Mr. Trower, Mr. Wetherell, Mr. W. E. Taunton, and Mr. Phillimore, for the Respondents, in support of the information.

This deed is to be construed as a declaration of trust, though, in form, one of covenant; at the time it was executed, that was the usual mode of declaring trusts, and the only one by which the performance of them could have been secured. The covenants are auxiliary to the objects of the donor; but to make them the limit of the duties of the trustees is inconsistent with those objects,

(a) 1 Atk. 618.

This case is not yet finally disposed of.

(b) *Attorney-General v. Catherine Hall*, Hilary Term, 1820.

1820.

ATTORNEY-
GENERAL

v.

MAYOR OF
BRISTOL.

and the general character of the deed. The sums to be distributed are not given as annuities out of the lands, but it is of the lands themselves and the rents that the trusts are declared; throughout, and particularly in the last clause, they are made the subjects of the trust. Trust is, in the first instance, predicated of the whole, and the increased rents must therefore be distributed. There is nothing in the subsequent parts of the deed to cut down the general declaration at the commencement. The succeeding clauses strongly evince that the intention of the author was the reverse, and account for trusts not having been declared commensurate with the fund. The sums distributed were all that could be certainly calculated on; the surplus, it is evident, was to be left in hand for repairs; if there was no fund for that purpose, the great object of the deed, which was to secure the regular payment of the sums distributed, might be defeated; the charity must stop while the estate was repairing itself. For extraordinary cases an express provision is made, but other cases of repair, the insolvency of tenants, and the expences of recovering rents, were to be provided for out of this fund. Trustees can only take beneficially either by express gift or necessary implication; there are no words of gift in their favour applicable to the surplus, and none from which it can be inferred. Their care and trouble is not a sufficient ground for such an inference. But, in this deed, there is strong evidence of an opposite intention; the 2000*l.* is not given to the corporation of *Bristol* by words of gift, but merely by recital. If the purchase was to be confined to 120*l.* a-year, what is the meaning of the words, "and more." The corporation is one of the objects of the trusts; and it is inconsistent therefore to say, that it shall take more than is expressly given to it. It is argued, that they were clearly intended to have the surplus, because no compensation, as in the case of the other corporations,

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is given to them for their trouble. It may, perhaps, be fairly inferred, from the general context of the deed, that they were also to have 4*l*., but if not, the argument from intension is repelled by the enjoyment which is given to them of the property for ten years, before the other corporations take any thing; and by the circumstance that St. John's College, which also has duties imposed on it, is to have no remuneration whatever for its pains and trouble.

1820.

ATTORNEY-
GENERAL
v.
MAYOR of
BRISTOL.

It is argued, that the corporation have entered into burthensome covenants, and subjected themselves to liabilities, quite inconsistent with the notion of their being merely trustees; your Lordship has observed, that trustees may bind themselves by penalties to the performance of duties. In this case however, they will not be subject to any loss, except through their own negligence, and, except in that case, this court would probably relieve them from the forfeitures to St. John's College, and consider that clause merely as *nomine pænæ*. The obligation is only to pay the annual sums out of the rents and profits; and, in order to sustain an action, it would be necessary to aver, that there were sufficient rents for the purpose. There are three covenants; the *first* is expressly to pay out of the rents, because the introductory words clearly govern all the payments; the *second* renews the rotation, and secures the continuance of it in perpetuity; it also mentions, that the payments are to be made out of the rents; and the *third*, nearly at the end of the deed, is to pay according to the intent and effect of these presents, and is therefore controlled by the prior clauses; the two first clauses contained particular directions as to time and place, which might have caused difficulties in suing on them; this is more general and in furtherance of the same object. The clause providing for the failure of rents by fire, &c.

1820.

ATTORNEY-
GENERALv.
MAYOR OF
BRISTOL.

is a decisive answer to the same argument; and the direction to apply the subsequent rents in making good the deficiency, proves, that they were the fund out of which the payments were to be made; the direction also, that the corporation of Bristol shall account for the rents to St. John's College, shows that it was to be a trustee and an accounting party. The arguments, that 200*l.* was to be paid in the 9th year, and that the 2000*l.* might not have purchased lands producing 120*l. per annum*, can have no weight, when it is recollected, that the corporation had been receiving rents for several years, and must therefore have had a fund in hand, and that it appears, that lands producing 70*l. per annum*, were purchased for only 800*l.* We contend therefore, that the corporation was merely a trustee, and that an information might have been filed at any time after this deed was executed, to have had the 16*l.*, or the annual value of the land above, 104*l.* distributed; the meaning being, that this sum should be distributed, and the rest retained as a fund for securing it; and the only question would have been, as to the *quantum* of surplus rent necessary to be retained for that purpose. The word assignees, which occurs in many parts of this deed, cannot mean assignees of the land, as must be obvious by referring to some of the clauses in which it is used, particularly in that relating to the penalties; if it has any meaning, it must have been used in the same sense as agents.

If this deed then, is to be construed as a declaration of trust, the *Coventry* case expressly applies; the decision of the House of Lords in that case established a new principle. It did not proceed on the same ground as the *Thetford* case, but on this, that the deed, although the provisions of it were made by way of covenant, was to be construed as a declaration of trust. The circumstances of this case are much stronger in favour of that construction

construction than those of the *Coventry* case. In the latter the sum had been lent to *Coventry*; and it is not quite clear, that they did not advance part of it (a);

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1820.
ATTORNEY-
GENERAL
v.
MAYOR OF
BRISTOL.

(a) The statements in the different reports of this case have raised some doubt on this point. In the report in *Vernon*, p. 397, it is stated, that the corporation had raised 400*l.*, and that the residue of the purchase-money was paid by *White*; but it is mentioned in a note to Mr. *Raithby's* edition of *Vernon*, that the decree was entirely founded on the deed or articles of agreement by which the trust was created; they are set forth in the answer of the Defendants, and state the whole 1400*l.* to have been given and paid for the purchase by *White*. This is confirmed by a copy of the original deed, which was furnished by the Merchant Tailors' Company, and is commented upon by the Lord Chancellor, *infra*, p. 322. Lord *Holt*, in his judgment, a copy of which is inserted in 3 *Mad.* 353, assumes, that the whole 1400*l.* was in effect paid by *White*. In the printed case of the Respondents, which is to be found in a collection of appeals, determined by the House of Lords, in *Lincoln's Inn Library*, vol. 2. 1697 to 1702, it is stated, that the city had received 1000*l.* towards the purchase from *White*, and that they had raised the rest by money out of the common box, a gold ring and goods by them pawned or sold, &c.; and then, after stating the deed or articles, and that the city had given a bond to the Merchant Taylors in 4000*l.*, to perform these articles, and were subject, by the covenants, to other penalties, for any neglect in disposing the 70*l. per annum*, as aforesaid, it mentions, that by these articles and letters of *White*, it appears, that he freely gave the said city the money they had from him; but it does not certainly appear how the 1000*l.* he gave them at the time of the purchase was afterwards made up 1400*l.*, whether he paid them 400*l.* more, or whether it was done in some other way. In the Appellant's case it is stated, that the whole 1400*l.* was advanced by *White* before the purchase was made. It is mentioned, in a note on the back of the Respondent's case in the above collection of appeals, that

1820.

ATTORNEY-
GENERALv.
MAYOR OF
BRISTOL.

it does not appear that the lands had been purchased as here, as part of the corpus of the trusts; and there were not the same admissions of trust as in this case. The manifestations of preference were much stronger in favour of the city of *Coventry*; it was stated that it had gone to decay, and it was to have the sole enjoyment for forty years. But, upon the authority of the other decided cases in favour of charities, this demurrer cannot be supported. The clause respecting fire, &c. brings this within the principle of the *Thetford* case, because, as the charity was, in that event, to suffer from a decrease, it is entitled to benefit by an increase. The case of the *Attorney-General v. Arnold* has decided, that, where there is a gift to charity in general terms, the whole rents must be applied, although they are not exhausted by the particular scheme; and that the Court will infer a gift, not only of the future, but of the present surplus, if not disposed of. In that case it is quite clear, that the testator must have known, that he had not specifically distributed all the rents. In the present case a general charitable purpose is clearly declared; and moreover, the property is to be applied to no other uses whatever: it is impossible to get over the effect of these words, the surplus cannot be taken from the charities except by express gift. In general, the heir-at-law takes every thing that is not expressly given away; but the Court has relaxed that rule in favour of charities. In the present case it is not necessary to go so far; the Court is only

the decree below was reversed by one vote only. The report in *Colles* appears to have been taken from the printed cases of the Appellant and Respondent. The case reported in *Brown's Par. Cas.* relates to an appeal from a subsequent decree, which was made after the former suit upon a bill filed for the purpose of removing the corporation of *Coventry* from their situation as trustees of the estate, in consequence of subsequent misconduct.

asked to make an implication against a trustee. The difficulty of obtaining the concurrence of so large a number of public bodies as twenty-four, accounts for the delay which has taken place in filing this information; and the answer which was put in to the bill in the suit in 1713, shows that there was then little encouragement to prosecute it.

1820.

ATTORNEY
GENERAL
v.
MAYOR of
BRISTOL.

The LORD CHANCELLOR.

In former times the Court acted upon principles in the construction of deeds and wills, when charity was the object, which, if they could be re-considered, would not now be adopted. If the doctrine of resulting trusts had been then understood, the right of the heir-at-law would never, in all probability, have been got over. The doctrine laid down in the *Thetford* case, which has been adhered to since, was, that if the whole land, and rents of it, at the time, are given for a charity, those to whom the lands are given, must, if there is an increase in the rents, apply them to charitable purposes. There are other cases where the same doctrine has been held, not only where the gift has been of lands; but where it has been of rents and profits. That must be admitted. This case has these peculiarities, that those who have the lands vested in them are part of the objects of the charity, and being so, it likewise appears upon the face of the deed, that there must be an excess beyond the amount of the fund distributable amongst the objects of the charity. The *Thetford* case can hardly apply, if, upon the whole instrument taken together, it appears that it was not intended to give the whole value of the property to these charities which take 104*l.* a-year. If I give an estate to trustees, and take notice that the payments are less than the amount of the rents, no case has gone so far as to say, that the *cestui que* trust, even in the case of a cha-

1820.

ATTORNEY-
GENERAL
v.
MAYOR of
BRISTOL.

rity, is entitled to the surplus; there would either be a resulting trust, or it would belong to the person who takes the estate. The case of the *Attorney-General v. Arnold* established this; that if I give to *A B* my lands for charitable purposes, and then give sums of money to charities not amounting to the whole rents, *A B* is a trustee of the surplus for charitable purposes, to be ascertained by the King's sign manual, or the Court of Chancery: but suppose that *A B* was a charitable corporation, might it not be argued, that the gift of the lands, and certain payments out of it, would make good the recital, because one charity would take in the shape of lands, and another in the shape of a pecuniary payment. That case went on a principle in favour of charities, acted upon by this Court in several cases, (which, if new, could not, I think be sustained), viz. that though a particular purpose fails, effect will be given to the general intention. This was carried to a still greater length in a case, where a sum given by will, for the support of a Jewish synagogue, was applied to the support of a foundling hospital. (a) It would have caused some surprise to the testator if he had known how his devise would have been construed.

If the surplus rents are to be distributed in proportion to the relative amount of the different charges, and *Bristol* is entitled to the 16*l.* or 20*l.* surplus, that, as well as the other charges, would be increased; but if the argument for the relators can be supported, a trust attaches on the 16*l.* also. The corporation of *Bristol* is cut down to a mere trustee, without any remuneration whatever; and I must now say, that if a bill had been filed in 1757, the Court would have been bound to have made a decree declaring the trust of it; and supposing the whole 2000*l.* had been laid out in that year, and it had happened that

(a) *De Carta v. De Pas. Amb. 228.*

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the 16*l*. or 20*l*. was not wanted for repairs, the Court must then, if this suit can be maintained, have distributed that sum. Then *Bristol*, a favourite object with the donor, is the only corporation that has not a single farthing for its trouble. It has been argued, that *Bristol* has a large and exclusive enjoyment for ten years, but that is in the same way as the inhabitants of the other cities, and not in the sense in which the other corporations take the 4*l*.; and if it were, consider how far the argument would go: *Newcastle* is not to partake until twenty-three years after *York*, and yet *York* is to receive the same remuneration for its trouble. With respect to *St. John's College* having no compensation for its trouble, it must be recollected that *White* had made it one of the most magnificent institutions in the country, and in the deed he is described as its founder. If the payments are only to be made out of the rents, the corporation certainly would not be liable in case of a deficiency; but then, what in that case was the use of the provision respecting fire? The covenant at the end does not say a word about rents and profits; and his meaning might be to secure the payment by the covenant of the corporation, as well as by fixing an obligation on them in respect of the rents. Much stress has been laid on the words 120*l*. "and more;" but did he mean more or less than this? Calculating, as well as he could, what would purchase 120*l*. a-year, he might say, if that is purchased, there will be a certainty of having the payments secured and carried into execution; if more is purchased, it is nothing to me, except that there will be a better security for them. I am satisfied if they are secured. It is observable, that the lands are to be of the value of 120*l*. over and above all reprises.

The Lord Chancellor afterwards observed that the Solicitor-General appeared to have been made a party,

1820.

ATTORNEY-
GENERALv.
MAYOR &c
BRISTOL

1820.
 {
 ATTORNEY-
 GENERAL
 v.
 MAYOR OF
 BRISTOL.

(a thing which he had never heard of before), or a suggestion that *White* had left no heirs; and that, if so, and it could be made out to be a resulting trust, the crown would no doubt be entitled to the surplus; but it was important to consider whether the crown might not have an interest of another sort, and be entitled to contend on the ground of the fund being devoted to charitable purposes, that it had a right by its sign manual to direct the application of the surplus.

The present information was framed upon the notion, that the charities mentioned in the deed were entitled to the surplus: it did not contain any prayer in the alternative, and although the Court, in the case of a charity, was in the habit of applying the fund in the way in which it ought to be applied, without regard to the prayer of the information, there was a difficulty in allowing the Attorney-General that latitude of argument in this case, on account of another law officer of the crown having been made a defendant, who might bring forward the claims of the crown. If the crown was entitled to direct the application of the surplus by its sign manual, or to claim it as *ultimus hæres*, it would have an interest, though not as against the prayer of the present information, in destroying the demurrer. It was impossible therefore to decide that *Bristol* was not a trustee of the surplus, without hearing the Solicitor-General on these points.

The case stood over for some days, to give an opportunity to the counsel for the crown to discuss the points suggested by his Lordship, if they thought proper. Mr. *Mitford* afterwards stated, that he had been instructed to support the right of the crown, as representing the heir-at-law; but the Lord Chancellor observed, that in that character the crown had no chance, and he was only desirous

sirous of hearing counsel in support of the right of the crown to direct the application of the surplus. No further argument, however, was addressed to the Court.

1820.

 ATTORNEY-
 GENERAL
 v.
 MAYOR OF
 BRISTOL.
 Dec. 11.

The LORD CHANCELLOR.

This comes before me on an appeal from an order of the Vice-Chancellor overruling a demurrer to an information and bill, filed by the Attorney-General. The information states, that Sir *Thomas White*, being desirous of benefiting the inhabitants of the towns and corporations aftermentioned, about the year 1566, paid to the mayor and corporation of the city of *Bristol* 2000*l.*, upon trust, to purchase messuages, lands, &c. of the *then clear yearly value* of 120*l.* and upwards, to be settled as mentioned in the indenture thereafter stated; and then, after reciting that part of the 2000*l.* had been laid out in the purchase of lands of the then yearly value of 76*l.*, it states the effect of that indenture, which it is not necessary now to detail. It is an instrument of great length, and it appears to me absolutely necessary not only to look at the whole contents of that instrument, but to consider the effect of almost every word that occurs in the different parts of it. The information then goes off to represent (this deed having been executed in the year 1566,) that the manner in which the corporation of *Bristol* dealt with the property, was by paying, and advancing the several sums mentioned in the indenture, in the manner and form in which they were to be paid; that the property has increased very considerably in value; and the *Attorney-General* contends, that the increased value ought, some how or other, to be applied for the benefit of the various corporations before-mentioned; and that the surplus, above the particular sums specified

1820.

ATTORNEY-
GENERAL

v.

MAYOR OF
BRISTOL.

II.

specified and directed to be paid to each respective corporation, ought not to be retained by the corporation of *Bristol*; but that these respective sums should be increased in certain proportions, formed upon the ratio which the sums specified bear, to what was the value of the land at the time, and that all these corporations, to the amount of twenty-three, besides the corporation of *Bristol*, ought to partake in the surplus beyond the sum of 104*l.*, which was the sum directed to be paid to each corporation in rotation.

The *Solicitor-General* is made a party to this information, and he is made a party merely on the ground of a suggestion, that Sir *Thomas White* left no heir-at-law; and he insists, that there is some interest in the crown as standing in the place of the heir. And, as I understand this information, the *Solicitor-General* is brought forward, not for the purpose of insisting upon any right which the crown has by its sign manual to direct the application of this surplus fund, as one devoted to charitable purposes — not upon the notion, supposing this surplus fund is to be applied to charitable purposes, that the Crown, although all the purposes are not expressed, has, where there is a general expression of charitable purpose in a deed, a right, by its sign manual, to direct the application of the surplus; — not upon the notion, that the *Attorney-General* could not, at the hearing, (which, in the case of charity, he would be at liberty to do,) supposing he was of opinion that the surplus ought not to go as claimed by the information, insist upon some other application of it. — But I understand the *Solicitor-General* is made a party, merely upon the notion, that there being a defect of heirs, the crown would be entitled, for its own benefit, to the surplus. I mention these circumstances, because I wish it to be understood, that I conceive myself, in

1820.

ATTORNEY-
GENERALv.
MAYOR OF
BRISTOL.

this situation, with respect to this case, that my opinion is asked, whether this information, for the purpose, and for the purpose merely, of applying this surplus in some proportions, not defined, for the benefit of these respective corporations — whether this information, so understood, can be supported? I take notice of this, because it is not unfit to observe, that the information introduces no question as to what the corporation of Bristol, if entitled to the surplus, is to do with it, whether they have a right to retain it? or if not, whether they are to apply it to charitable purposes amongst their own body, or to any others than those expressed in the information? I state these circumstances, in order that it may be understood how the question is brought before me.

There is another fact which I shall take notice of, before I comment on the deed. There was a suit, as I am informed from the bar, in 1718, with respect to this very property. It appears, as I am informed, from what is to be found in the records of that suit, that the 2000*l.* would in all probability have purchased a great deal more than 120*l.* a-year. It further appears from that suit, and what is more material, it appears from the indenture under which the present question arises, that property, part of that which is now in question, had been purchased by the corporation of Bristol, not in 1566, but many years before, to the amount of 76*l.* per annum; and I do not find that the *Attorney-General* or the relators have thought it worth their while to introduce into this information any charge whatever with respect to what had been the application of the 76*l.* a-year, purchased long before the date of this indenture. For aught I know to the contrary, and for any thing that appears, the corporation of Bristol, from the reign of *Henry VIII.* to 1566, the date of this deed, might have applied the whole of the 76*l.* a-year to their own

use

1820.

ATTORNEY-
GENERAL
v.
MAYOR OF
BRISTOL.

use and benefit. If, by tracing the history of this property, it could be found, that this 76*l.*, between these periods, had been applied to charitable purposes, it might have been very important to have charged it in the information, and to have brought that fact before the Court and established it, for the purpose of showing how this property had been dealt with from the beginning. If, between the periods I have mentioned, the 76*l.* was applied by the corporation to their own use, the construction of this deed, by which it is contended that no more was meant by it than that these particular disbursements and payments should be distributed to these respective corporations, would receive consistence from the prior enjoyment; if that was not the nature of the prior enjoyment, that fact might in some measure affect the construction of the deed. I mention these circumstances, because I desire to have it understood, that any opinion given by me, is not to be applied to any question whatever, but that question, and that alone, which is now stated for my decision, viz. whether, upon the mere construction of this deed, unassisted by the mention of any one fact whatever, either as having happened before or after it was executed; the prayer of this information, and that prayer only, can be granted. I do not mean to say that these pleadings are not such that the *Attorney-General* might address other questions to the Court, but they have not been addressed to it, and it would therefore be premature to give any opinion upon them.

I have made these prefatory remarks, that it may be understood, whatever may be the case upon this information, should it be amended, that in the opinion I now give, I am governed simply by the view I take of what is the construction of this instrument, and by that alone, because, supposing the Vice Chancellor's judgment to be

be that in which I concur, it would be absolutely necessary, that some words should be introduced into the judgment; as where there is a demurrer, it allows every thing alleged that is material to be true, and if, therefore, the allegations in this bill, if taken to be true, would make it impossible to overrule or allow the demurrer, supposing the question is to be decided on the deed alone, it should be recorded in the judgment of the Court itself, that that was the view the Court had taken of it by the consent of parties, and so I understand the Vice Chancellor to have taken it. Any opinion I now give, therefore, is to be understood to be without prejudice to any new or amended information that the *Attorney-General* may file, should he, upon looking into the matter, think it right to do so. Regard being had to the fact, that from the year 1566 down to this time, the enjoyment of this property has, as it appears to me, been as adverse as it could be to the prayer of this information; and regard being had to the fact, that the *Coventry* case occurred in 1700, and that there was a proceeding as to this property in 1713, (and I should be inclined to think, if I were at liberty to form a conjecture, that if the proceedings at that time had been carefully looked into, something might have arisen material to be considered in this case,) the question is, whether, according to the true intent and meaning of this deed, the corporation of *Bristol* are trustees of the surplus rents and profits, or any and what part of them, for these corporations

1820.
 ATTORNEY-
 GENERAL
 v.
 MAYOR of
 BRISTOL.

The principles of the Court on this subject, as deducible from the text writers and authors, will take no great time to mention; they are not open to much controversy, and I think they may be found in *Duke's Law of Charitable Uses*. In chap. 7, s. 2, p. 112, it is laid down, that "if one deviseth the rent of his land to a charitable use, this shall be taken largely for a devise of the rent then reserved, or afterward to be reserved,
 upon

1820.

ATTORNEY-
GENERALv.
MAYOR OF
BRISTOL

upon an improved value;" the cases in chap. 6, which are referred to in illustration of this doctrine, and some others to be found in the same chapter, it is material to attend to. In that of the *Inhabitants of Ellham v. Warreyn* (a), it is laid down, that if land of the value of 3*l.* *per annum* be given to repair highways, and it afterwards increases in value to 11*l.*, the whole of it must be applied in the same manner. By the second resolution in the case of *Sutton Colfield* (b) it was resolved, "that if lands of the value of 3*l. per annum* be given to maintain a schoolmaster; and, in the deed, it is expressed, that the said 3*l.* shall be only employed to maintain that use, and no other use is expressed in the deed; and afterwards the land increaseth to a greater value, all the increased rent shall be employed for maintenance of that charitable use," and the reasons assigned are, "because it doth not appear that the donor had any intention that the profits of his land should be employed to any other use, and at the first he gave so much as the land was worth." The next cases are those of *Hynshaw and Pydmers v. Mayor and Corporation of Morpeth* (c), *Kennington Hastings* (d), which are to the same effect; and then comes the *Thetford School* case (e), in which lands of the value of 35*l.* by the year were devised for the maintenance of a preacher, schoolmaster, and poor people, and certain proportions, amounting together to 35*l.*, were given to each. The lands afterwards increased in value, and it was decided, that the whole revenue must go to charitable purposes. The reasons given for this decision are, "for that it appeareth by the distribution of the deviser, that he intended that all the profits of his lands shall be employed in the charitable works by him founded, and left nothing to his heirs or executors of the profits of his lands, as they were in value at his death, and as if the value of

(a) *Duke*, 67.(b) *Ib.* 68.(c) *Ib.* 69.(d) *Ib.* 71.(e) *Ib.* 71.

the lands had decreased, the poor should have lost in their stipends, so when the revenue of the lands increase, they shall gain." And then the following passage occurs, and, with reference to many public bodies, it is one of great consequence; "and the Lord *Coke* said, that this resolution did concern all the colleges in the universities and elsewhere; for when the lands were first given for their maintenance, and that every scholar should have a penny half-penny a-day; this was then a competent allowance for a scholar, in respect of the price of victuals then, and yearly value of the land; and now the price of victuals being increased, the first maintenance for scholars is not competent for them; and as the value of the lands increase, so ought the allowance for the scholars to increase." If the text is to be understood thus, that where property has been given for the foundation of a college, and a distribution has been at the same time made of all the rents to given members of that college, there must be an increase, as the times require, for all those persons: of that there can be no doubt: but unless I am mistaken, there are many cases to be found in both the universities where land has been given of a greater value than the amount of the charges, (which have been for scholars, exhibitioners, and so on,) upon that land, and where in point of fact, the enjoyment has been this: the charges have been made good from time to time; and the surplus has been taken by the college itself, and, I believe, if this were considered an improper application of their funds, it would have the effect of disturbing the distribution of the revenues of many of the colleges in both universities.

1820.

ATTORNEY-
GENERALv.
MAYOR OF
BRISTOL.

The construction in these cases, I take it, must be considered to go upon intention; and the different rules furnished by the cases I have mentioned, are to be considered as *indicia* of the intention. Was it then the intention

The rules prevailing for the construction of gifts to charitable uses, are to be considered

1820.

ATTORNEY-
GENERALv.
MAYOR OF
BRISTOL.only as fur-
nishing indicia
of the donor's
intention.

The soundness of the principles that a gift of a rent-charge to a charity equal at the time to the annual value of the estate, carries the increased rent, and that as the charity would lose if the fund decreased, it ought to gain if it increased in value, doubted; but being settled by decisions, they ought not to be disturbed

tention of the donor that *Bristol* should be a trustee, bound from time to time, not merely to make the payments mentioned in the deed to these different corporations, but liable, *de anno in annum*, to be called upon, and that from the first year in which it was trustee, to apply the whole increased value, in proportions similar to those in which the property was distributed, according to its value, in 1566, or that it was to be entitled, after payment of the charges, to retain the surplus in the way in which several colleges retain it under grants to them. As far as I have read these ancient cases, they state it to depend upon the intention of the donor, and that one way of finding out that intention, is, to enquire, whether the whole of the annual value of the property was, at the time of the foundation of the charity, distributed amongst the objects of the charity? If it was, they say, that that circumstance is evidence of the donor's intention to give the whole of the increased value to the same objects. Whether that be a rule of evidence, which good and sound reasoning would have led one to adopt originally, I do not trouble myself with inquiring, but I cannot help feeling the force of what Lord *Hardwicke* says in the *Attorney-General v. Johnson* (a), that when the *Thetford* case was decided, the doctrine of resulting trusts was but little understood; and if the object of the gift had not been charity, I feel considerable difficulty in believing that this doctrine of the Court would have prevailed. Settled rules of construction, however, must not be disturbed; and this principle is of so much importance in administering the justice of the country, that according to my notion, if there has been not merely a variety of cases, but even only one ancient case, and there has been practice and experience in favour of it, it ought to be adhered to. Another rule to be found in

(a) *Ambl.* 190.

these ancient cases is, that as the charity would lose if the fund decreased in value, it ought to gain in case it increased. I should have doubted whether that was a sound rule of construction, but I take it to be one as settled as the other, and that therefore, it would not be right to disturb it.

1820.
ATTORNEY-
GENERAL
b.
MAYOR OF
BRISTOL.

In applying the two rules which I have mentioned to the present case, it will be necessary to recollect, that the whole annual value of the lands is not exhausted by the payments directed to be made, and that the donor, contemplating and providing for a decrease, directs that a subsequent increase is not to go entirely to those who had lost by the decrease, but that only a compensation is to be made to them.

Some of the most material cases which have happened since, (except the *Coventry* case, to which I shall have occasion to advert more at length), are to be found in *Ambler*. In the *Attorney-General v. Johnson*, (a) not only the value of the tithes was distributed in charity, but the whole profits of the tithes were given; and this circumstance assimilates the case to that of the *Attorney-General v. Arnold*, (b) where the whole value of the property was not distributed; but the Court fastened upon a declaration in the testator's will, that he meant the whole to be given to charity, and said, that where a general charitable purpose is expressed, the Court, or the crown, will find out what charity shall take. In the above case Lord *Hardwicke* observed, that he did not intend that all the charitable uses should be proportionally augmented. There can be no doubt that this Court has authority to alter the trust in the distribution of the increased revenues, if it thinks it expedient so to

In distributing the increased rents of a charity estate, the Court of Chancery has authority to alter not

(a) *Ambler*. 190.

(b) *Show. P. C.* 22.

1820.

ATTORNEY-
GENERALF.
MAYOR OF
BOSTON

only the proportions in which the objects of the charity would take under the original instruments, but also the objects themselves.

de. A remarkable case of this kind occurred before Lord Hardwicke; a person had founded a charity by giving an almshouse for five poor men; the charity establishment was greatly abused, and, upon a proposal being laid before the Master, he reported, that the number of poor men should be increased to ten, and that five poor women should be added; and my Lord Hardwicke was of opinion, that it ought to be so, upon the notion, that he had power, not only to increase the objects of the charity, but to make an alteration in them. It is not reported, but I have taken it from a MS. book in my possession, which belonged to Mr. Brown, who was at that time an eminent practitioner in this Court.

The case of the *Attorney-General v. Sparks* (a) is very ill reported. The Master of the Rolls, it is stated, observed, that the testator could not have had any idea that the estate would increase in value; but it is clear the testator must have known that there would be an increase, because he gives life annuities out of it, which, of course, would in time fall in. He, however, states, that the intention of the testator was, to dispose of the whole estate to charity, and, if that were the case, it is so far right. There is another case (b) towards the end of *Ambler*, which proceeds on the principle already stated, and authorizes us to say, that if a testator gives all his lands to charitable uses, and then mentions some, but not so many as to exhaust the whole value of the land, yet the gift will carry all the rents and profits, in point of application, to charitable purposes. The case of the *Attorney-General v. The Haberdashers' Company* (c), does

(a) *Ambler*, 201.

(b) *Attorney-General v. Herrick*, *Ambler*. 712.

(c) 1 *Ves. Jun.* 1. S. C. 4. *Bro. C. C.* 105.

not carry the doctrine farther. The judgment of Lord Commissioner *Myre* goes upon this, that the first deed having devoted the whole to charitable purposes, and the second reserving certain powers to the author of the charity, which enabled him to limit the application of the rents to charitable purposes to 1754; as soon as that provision, and the objects of it, ceased to have effect, the increased rents must go according to the first instrument; and that it having given the whole to the school, and other pious and charitable purposes, the Court must so apply it.

1829,
ATTORNEY-
GENERAL
v.
MAYOR OF
BENTLEY

The next material case is that of the *Attorney-General v. Mayor and Corporation of Coventry (a)*; it does not appear to me that the statement in any of the reports is exactly conformable to the case which must have been under consideration, when you look to the deed itself, with a copy of which I have been furnished by the Merchant Tailors' Company, and to which I shall presently refer. His Lordship then read the report of the case from *Vernon*, and on coming to that part of the judgment in which it is stated that a charity is not barred by length of time, proceeded as follows. The statute of limitations undoubtedly does not apply; but length of time, (although it must be admitted that the charity is not barred by it), is a very material consideration, when the question is, what is the effect and true construction of the instrument? Is it according to the practice and enjoyment which has obtained for more than two centuries, or has that practice and enjoyment been a breach of trust? If it has, we must not scruple to disturb it; but still regard must be had to that circumstance, and the more so, because, admitting that in the *Coventry* case there had been a century of abuse, we must recollect that

Although a charity is not barred by the statute of limitations, an adverse enjoyment for a long time is a very material consideration in construing an instrument under which it claims.

(a) 2 *Vern.* 597. *B. C.* & *Bro. P. C.* 256. vol. vii. Tom. Ed. 255. *Collyer. R. C.* 220.

1820.

ATTORNEY-
GENERAL

O.
MAYOR OF
BRISTOL.

that case was determined about the year 1700; and, if it was understood to afford a rule which was applicable to the present or similar cases, it is difficult to suppose that the persons interested in the *Bristol* charity could be ignorant of it, as some of the corporations and parties to that suit were the same persons as are interested in the distribution of the *Bristol* fund; and, in fact, it does appear to have provoked inquiry, for, in 1713, a suit was instituted for the same purpose as the present, but which has never been prosecuted since.

It has been attempted to account for this by suggesting, that the surplus rents at that time might have been so inconsiderable, as not to have made it worth while to prosecute it; but however that may have been, these circumstances led me to make the observations which I have before made, and to state distinctly the grounds of my present judgment. I think I am bound to consider, that, in the *Coventry* case, the property was bought with the money of Sir *Thomas White*, and, in truth, it is so stated in one of the reports, and in the deed itself. The copy which I before mentioned bears date in 1551, and states, that the purchase was made by the city of *Coventry*, and that what was so purchased was of the clear yearly value or rent (considering value as rent, and rent as value) of 60*l.* 10*s.* or thereabouts; and, after mentioning that *White* was minded to relieve and prefer the commonwealth of the city of *Coventry*, then in great ruin and decay, (certainly not stating, as in the *Bristol* deed, that it was for the commodity of the other cities), it states that *he* of his goodness has given the sum of 1400*l.*; so that the deed expresses the purchase-money to have been wholly supplied by him; and not only that, but it states, that the thing purchased with the 1400*l.* was of the clear yearly rent and value of 60*l.* 10*s.*, and that is the sum which in different proportions, was distributed amongst the

the different objects of the charity. With respect to the form of the deed, which is by way of covenant, I take it, that in deeds of that date, a covenant, in cases of this kind, may be looked upon as a declaration of trust; but there is no passage in this deed, under which it could be held, that the corporation of *Coventry* was to pay any of these sums except out of the rents, and save only in case of wilful default. There would be no wilful default if the lands fell in value, and non-payment would not be a breach of the covenant, if they were obliged to incur great expense in recovering the rents. Many circumstances, however, might happen, which would amount to wilful default, and, being trustees, they must be answerable for it whether expressed in the instrument or not. But these engagements, as I read this instrument, are engagements to pay out of the rents and profits, they being estimated at the clear yearly value there mentioned; and that clear yearly value, at the time, being distributed amongst objects which exhausted the whole of it. It therefore falls within the principle of the former cases; there is evidence of that intention which they have determined to be sufficient to carry the increased rents to charity. But no one can read the judgment of Lord *Holt*, without seeing in it proofs of the great knowledge of law which distinguished that illustrious man, nor without satisfying himself, that if these older cases had not existed, such a principle would not have been introduced. In the opinion which I give upon the *Coventry* case, I found myself upon the deed itself, and that deed, I apprehend, amounts to an acknowledgment that the money was wholly supplied by Sir *Thomas White*, and that the clear yearly value of the property was exactly the sum, which was distributed in different proportions among the objects of the charity. If the corporation thought proper to sign the instrument containing these admissions, they must be bound; but, upon the construction of that

1820.
 ATTORNEY-
 GENERAL
 &
 MAYOR of
 BRISTOL.

1838.
 Attorney
 General
 v.
 Maron of
 Bristol:

instrument alone; it appears to me the House of Lords was perfectly right in its decision.

The doctrine in the *Coventry* case was shortly afterwards attempted to be applied to this case, and an information was filed for that purpose. It however was not followed up, and the present information has been filed, and prays a different distribution from that which has hitherto obtained, of more or less of this surplus beyond the 104*l*. I say more or less, because, with respect to the difference between 104*l*. and 120*l*. and more, no use is expressed in this instrument, and the difference might have been more than 16*l*.; for, if the corporation of *Bristol* was bound to lay out 2000*l*., as the Vice Chancellor thought, and as I think they were, it would either have produced 120*l*., (they were bound to get that,) or it would have produced that and more, in the language of this deed. Now, when we are considering what is the effect of words in one part of a deed, and when we are stating that they can apply to no other uses than those expressed in the deed, I ask where there is any use expressed in the deed with respect to the 16*l*. surplus, or where there is any use, if the purchase should produce more than 120*l*. *per annum*, expressed as to the difference between 104*l*. and that sum. There is no such use, intent or purpose, and the question is, whether these general words, which have been so strongly alluded to, do, or do not, shut out the fair effect, inference, and conclusion to be drawn from all the other parts of the deed, taking the whole together?

Sir *Thomas White* ought to be considered as a party to the deed, for though not named as one, he executed it. The deed mentions, as far as I have read, that *Bristol* had received 2000*l*. of Sir *Thomas White* (whether the fact was so or not, it must be taken to have been so.)
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for the purpose of applying it for the benefit and welfare of the city of *Bristol*, and upon the uses, &c. thereafter mentioned; and this deed, which was executed in the 8th of *Elizabeth*, 1566, mentions, that of that sum, they had laid out, in the 34th of *Henry VIII.*, so much as had purchased land of the clear yearly value of 76*l.*; but neither this deed, nor any charge in the information, inform me how that 76*l.* had been applied between the 35th of *Henry VIII.* and the 8th of *Elizabeth*, whether, during this period, *Bristol* had taken all those rents to its own use, or whether all or any of them had been applied to any other uses, does not at all appear. I mention it for this reason, the corporation of *Bristol*, in the 8th of *Elizabeth*, are in possession of an estate of the yearly value of 76*l.*, purchased, as this deed must be taken to express on all sides, with money which was part of the money advanced by *White*: being in possession of that property, in what manner it was enjoyed might be a very material circumstance to learn and to know in an information case, because if for instance, in the 34th of *Henry VIII.*, *White* had advanced the whole 2000*l.*, and in that year it had been laid out in the purchase of lands of the value of 120*l.* a-year and more, instead of 76*l.* only; and if, between that time and the 8th of *Elizabeth*, they had had the ownership, and the beneficial ownership too, you must consider what is to be the effect of a deed when they were declaring a trust of property, which they had enjoyed prior to that declaration of trust, and what is to be the effect of an instrument containing these words, "uses aftermentioned," and no other, where you are obliged to admit, that part of the surplus beyond the 104*l.* is to be applied to uses not declared at all. It would be material to consider what is to be the effect of a declaration of trust, made by persons in the actual possession of property to which the

Y 4

declaration

1829:

 ATTORNEY
 GENERAL
 v.
 MAYOR of
 BRISTOL.

1820.

ATTORNEY-
GENERAL
v.
MAYOR OF
BRISTOL.

declaration of trust applies, as capable, or not capable, of being contradistinguished from a declaration of trust, made by a person who is receiving the estate under the grant and gift of another at the time he makes the declaration of trust. In the one case, the property being in the individual at the time, the uses to which it is to be applied must be regulated in some measure by that fact; and in the other, (being a case where, putting charity out of the question, it is taken by grant at the time, and the use does not comprehend the whole beneficial interest,) he who is taking, could not take what the other would retain in the case I before put.

The deed then goes on to state, that the mayor and corporation of *Bristol*, within the space of four years, were to purchase lands, which, together with those purchased, were to amount to the clear yearly value of 120*l.* and more, over and above all yearly charges and reprises, to be applied to the uses aftermentioned (I apprehend uses here merely mean the same as intents and purposes,) and that the rents of both are to be employed in manner therein specified; and then follow these words, "and to no other uses, intents, or purposes." But though these words are here inserted, the question upon the whole deed will be, what you are to do, or what was the intention of the author of this deed to do, with rents and profits not given to the uses aftermentioned? Now to get at that question, see what they are to do; they have four years to purchase land; a particular distribution is directed during eight years; a particular payment is directed in the ninth year; I doubt whether there is to be any payment at all in the tenth year; and then when you come to look at all the clauses following the enumeration of the different cities mentioned in the deed, and to consider their effect, the question is, whether

whether it is not the fair construction of this deed to say, that, although you ought to be beat out of the construction which arises out of those plain words, *to no other use*, yet, if you find, from the whole frame of the instrument, you cannot give that effect to them which they might have in other cases, it becomes a question of intention, which you must collect from the whole deed; and, if the intention is, that they should not have that large effect now contended for, is it not the true rule of construction to give them the effect which they ought to have by considering all the parts of this deed taken together?

1820.
ATTORNEY-
GENERAL
2.
MAYOR OF
BRISTOL.

At this time, that is, when the first payment of 100*l.* was to be made, lands were purchased producing 76*l. per annum*, and no more; that being the case, there are four years, within which they are to make up the purchase to 120*l.*, and more; four years' time is given, during which, however, they are to pay to these young men 100*l. per annum*. Now, if you are to consider, in a court of equity, that the 120*l. per annum*, and more, had been bought immediately after the execution of this deed, and the question had arisen, not in the year 1820, but in the year 1567, what was to be done with that 20*l. ultra* the 100*l.* which was to be thus paid, or with the excess, if it was more than 120*l.*, as in all probability would be the case, if you could take notice of what passed in the former suit, the question would have been the same in 1567 as in 1820. You cannot look at this deed, and say, from any expression in it, what is to become of this sum, if you look to no other use, intent and purpose, than what is there expressed; there is none expressed with respect to that 20*l.* In the whole of the argument on the other side, you are driven to admit this; and, in any way of putting it, it can only be contended, that the corporation of *Bristol* were to be trustees in this sense, that they were to retain

1820.

Attorney-
General
v.
Mayor of
Bristol.

16*l.* for repairs and charges, and to distribute the other 104*l.* One observation on that is, that during eight years, it was not 104*l.* that was to be distributed; another is, that, during the time that *Bristol* is to take any thing, there is nothing about 104*l.* Then it is said they are to take 16*l.* for repairs; and, in the latter case, it is not unfit that they should have 4*l.*, like the other corporations, for their pains. But that argument fails again, because, if that is the sum which is to pay the other corporations for their pains and trouble of distribution amongst their own bodies, we are to remember, that *Bristol* has trouble with respect to all these corporations; and if 4*l.* is a proper remuneration for what is done by *York* or *Canterbury*, it cannot be a proper one for *Bristol*, which is to be at much more pains and trouble, besides being subject to pains and penalties. Then, at the end of eight years, they are to find a fund to the amount of 200*l.*, for the purchase of corn, to be afterwards sold; and it would seem, according to the expressions, that the ninth year only was given them for that purpose. It may, however, I think, be argued, that it was to be supplied to the ninth and tenth year, or that it might be divided between them; but then, in point of construction, it must be recollected, that, in the first ten years, they were not to distribute 104*l.*, and that, with respect to the first four years, 100*l.* was to be paid, although 120*l.* a-year had not been then purchased.

The next part of this instrument is that which devotes a sum of 104*l.* to *York*, and the other cities and towns after-mentioned; and here it certainly expresses, that it is to be paid out of the rents, issues, and profits. With respect to almost every one of the other corporations, it is not expressed that it is to be out of the rents, issues, and profits; but I think that the passage at first ought, (subject to an observation which has been made upon the

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the subsequent covenant, which does not mention rents,) to be considered as governing the payments afterwards to be made, and as settling the fund out of which they are to come; and I will take it so. Then come the different corporations in rotation, until you come back to *Bristol*, and there the 4*l*. is merged in the surplus, as well as the 16*l*. In this clause relating to *Bristol*, I observe the word assigns is used. I think with Mr. *Wetherell*, that it would be too much to say it meant assignees of the property.

1820.
AFFIDAVIT
OF
MAYOR OF
BRISTOL.

The next clause is that which begins the rotation again, and then follows this clause, which I think is very material, and, if I am mistaken in my judgment, it is fit it should be known that I think it material. Upon comparing this deed with the clauses in the *Coventry* deed, I find that the latter contains only the common indemnity-clause, which every conveyancer puts into these deeds. The clause I have alluded to is, that which relates to the penalty; if the land was to be worth 120*l*. a-year only, it is a little difficult to see how the corporation, in some instances, could find so much money; if, on the other hand, the land was to be their own, with the improvements upon it, there would not be any reason why they should not forfeit at least to the extent of the increased value. But the more material observation is this, that these fines are to be paid not to the persons who receive the 104*l*., but to *St John's College*, and the college are to hand over the 104*l*., and to take the residue of the fines for their own use and benefit. It is very singular, if it was at all in the contemplation of the author of this gift (who does not exhaust all the 120*l*. or more at the time he makes it,) that the increased revenue was to go to the charities, that he should have gone on to say, you shall pay these fines to *St. John's College*; so that, although the estate produces more than 150*l*., this sum only is to be paid to *St. John's*; and the other

1820.

ATTORNEY-
GENERALv.
MAYOR OF
BRISTOL.

other cities and towns, instead of taking an increase, must be content with receiving the 104*l.*, the college retaining the difference between that sum and 150*l.* This can hardly be contended; but you must either go that length, or say that the true intent and meaning of the deed was, that if the sum to be paid to *York* or *Canterbury* was 200*l.*, (which by the increase of the rents might be the case,) and there was a default in payment, *St. John's* was to hand over the whole to them, but would be entitled, if it was only 120*l.*, 130*l.*, 140*l.*, or 150*l.* a-year, to retain all above 104*l.*; and if a proportionable increase is to be provided for by the Court, you must somehow or other get at the means of giving *St. John's* a proportion of that increase, regard being had to what *York* and *Canterbury* took under this deed, and what they would take by virtue of that increase.

Another very material clause is that of indemnity; and although this deed does furnish the argument which has been so strongly pressed, as arising out of the covenants, which it is said are to pay out of the rents only, and although it must be admitted, if there was no clause of this nature, the corporation would have a right to be indemnified in the same manner as all other trustees; yet the question here is, regard being had to the fact, that the estate is stated by the author of this deed to be worth 120*l.* and more, when not more than 104*l.* is to be distributed; and regard being had to the clause in which it is specially provided for what species of loss they shall be indemnified, whether it was not meant that it was that species of loss, and that only, that they should be able to state, as a ground for not making the specified payments; or, in other words, whether it was not considered and agreed, that they would have revenue enough, — rents, issues, and profits enough, — to make the payments;

ments; and whether it was not at the time agreed, that it should be understood, that they would have enough, unless deprived of some of the rents in consequence of the events mentioned in this special clause, and that they were not to be indemnified against insolvency of tenants, or low rents, or the expences of recovering them, or other events not expressed in the deed, which from the beginning says nothing about the 16*l.* going for repairs. The clause in question says, that if the estates should be notoriously decayed by any sudden misfortune, by reason of fire or other like occasion, that then, and from such time of *such* decay, &c. the payments should cease, &c.; and then comes the clause which says, that when the rents again increase, the deficiency arising from that particular species of decay is, when the rents admit of it, to be made good. Then you see they are not treated as trustees to all intents and purposes, and they have not, as it appears to me, a right to claim all such allowances as general trustees would have a right to claim; and this clause furnishes an observation upon one of those *indicia* of intention which is alluded to in all the cases, namely, that the testator must mean, that those who lose by the fall shall gain by the rise, because here they are not to bear the losses unless they arise from these particular causes, and if a deficiency does arise from them, they are not to have all the future rents, but the charge only is to be made good; it is the most difficult thing in the world, when considering this clause, to suppose, that if the rents amounted only to 120*l.*, only 104*l.* was to be made good, but that, if they exceeded that sum, the increased rents, whatever might be their amount, were to be divided in the proportions of 104*l.* to 120*l.*

1820.
 ATTORNEY-
 GENERAL
 v.
 MAYOR OF
 BRISTOL.

Then the question comes to this at last, taking
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1890.

ATTORNEY-
GENERAL
v.
MAYOR OF
BRISTOL.

the whole deed together, seeing that it is a case in which the value at the time was more than was distributed at the time, and in which the increase and decrease in value is regulated by a special provision, and recollecting that there is not one single case, — at least I have not been able to find one, — where the doctrine to be found in the *Thetford* case has been applied, except where the value, or what was represented to be the value at the time, has been distributed at the time, and recollecting, that *Bristol* was a material and prominent object of the bounty of the author of this gift, is this not a case which falls within the range of those cases in which property given to a corporate body, is given to it subject only to the charges imposed, and not as a mere trustee, entitled to no other benefit than what is expressly given to it in distribution, and entitled to all the indemnities of trustees, *ultra* those expressed and pointed out in the clause in which they are given? Upon the best judgment I can form, and laying out of view every thing but the question, whether this deed appropriates the surplus rents to those charities, I am of opinion, that they cannot, under the effect of this instrument merely, call for a distribution of the surplus. My judgment may be set right elsewhere, or the case may be reheard; but that is my opinion upon the effect of this deed, and the consequence is, that by putting some special words into the order, it does appear to me, this demurrer ought to be allowed.

And the said demurrer coming on the 25th day of April, the 18th &c. days of November, to be heard before his Lordship, on the said petition of appeal presented by the mayor, burgesses, and commonalty of the said city of *Bristol*, and of *John Langley*, their chamberlain, complaining

plaining of the said order of his Honour the Vice Chancellor, bearing date the 11th day of *November* 1819, whereby the said demurrer was overruled: the indenture of the 1st day of *July* 1566, in the information and bill, and in the petition of appeal in part recited, was, by consent of counsel on both sides, read at length to the Court, and it was agreed between the counsel on both sides, that the demurrer should be argued, and determined upon the true construction of the said indenture, without regard to any allegations in the information and bill contained (if any such there be,) whereby the question, whether the demurrer ought or ought not to be allowed, could or might be varied or affected, and with regard only to the particular relief prayed, and, therefore, after hearing, &c. his Lordship doth declare, that according to the true construction of the said indenture, the Plaintiffs, and the other corporations and towns therein named, are not entitled to the increased rents and profits of the trust estate in the information and bill mentioned, or any parts, shares, or proportions thereof, or to any interest in the rents and profits of the said estates, over and above the specific sums of money which, by the said indenture, the mayor, burgesses, and commonalty of the city of *Bristol* covenanted to pay to such corporations and towns respectively and in succession, and his Lordship doth, therefore, reverse the order of the 11th day of *November* 1819, and doth order, that the said demurrer be allowed.

1820.

 ATTORNEY-
 GENERAL
 v.
 MAYOR of
 BRISTOL

Reg. Lib. A. 1820. fol. 449.

1820.

ROLLS:
Dec. 11.

CUMMING v. FORRESTER.

A. & B. join in a petition to the crown, representing an estate to have escheated, and procure a grant of it to be made to them. Held, that *A.* could not afterwards set up a claim to one part under a prior title in himself, while taking the benefit of the grant as to the rest. The doctrine of election does not extend to grants from the crown.
Semble.

JOHANNA BARE of *Calcutta* being, in *January 1788*, about to intermarry with *Thomas Lee*, by indentures of lease and release of the 15th and 16th of that month, conveyed and assigned to trustees certain real and personal property, upon trust, for her separate use for her life, and, after her death, upon trust, as to a freehold upper-roomed house, in *Cossitulah Street Calcutta*, marked No. 6, to convey the same to her natural daughter *Fanny*, the wife of *Robert Cumming*, and the heirs of her body; but, in case of the death of *Fanny Cumming*, without issue, then immediately after her (*Johanna Bare's*) death, to convey it to *Thomas Lee*, in fee; and, as to the other freehold premises, upon trust, for *Thomas Lee*, in fee, in case of his surviving her, with a power of revocation and new appointment over the last mentioned premises.

The marriage took effect, and *Lee* afterwards died in *March 1797*, leaving his wife surviving; and, it being imagined, that by that event, it was become unnecessary to preserve the trusts of the settlement of 1788, the surviving trustee, by indenture, dated the 10th of *November 1797*, re-conveyed all the property comprised in the settlement to *Johanna Lee*, to hold, as of her former estate.

Fanny Cumming died in the lifetime of her mother, leaving one son, *Robert Cumming*, and one daughter, *C. I. F. Cumming* the Plaintiff, both infants, surviving her. *Johanna Lee*, by her will, dated the 16th of *September 1802*, devised her property, amongst which she mentioned her two upper-roomed houses in *Cossitulah Street*, to be sold, and, after payment of her funeral charges and legacies, the residue to be divided into two equal shares, one
of

which she gave to her grandson, *R. Cumming*, when he should attain the age of twenty-one, or marry, and the other to her grand-daughter, the Plaintiff, with a proviso, that, upon her marriage, it should be settled on her and her children. This will was attested by two witnesses only (a), in consequence of which, upon the death of the testatrix, in *October*, 1802, without any lawful issue or heir, it was conceived that the real estate, comprised in the will, escheated to the crown.

1820.
CUMMING
v.
FORESTER.

The bill stated, that the Plaintiff and her brother, *Robert Cumming*, having both attained the age of twenty-one, in the year 1808, presented a memorial to his Majesty, and afterwards, in *January*, 1813, a petition, stating that *Johanna Lee* was seised in fee-simple of all the premises above-mentioned, and that in consequence of the defective attestation of her will they did not pass, and praying a grant of them upon the trusts of the will. In consequence of this petition, by letters patent, dated the 26th of *June*, 1813, reciting the will and death of *Johanna Lee*, and that his Majesty had been advised, that her will was not by law valid for the purpose of passing her real estates, and that on her death without heir, the said hereditaments escheated to the crown, all the said hereditaments specified in the said devise, and intended for the benefit of the said *Robert Cumming* and the Plaintiff, were granted to *A. Colvin* and *G. Cruttenden* of *Calcutta*, their heirs and assigns, upon trust to sell, and after payment of such part of the funeral charges of *Johanna Lee* as might remain unsatisfied, to pay over a moiety of the residue of the proceeds to *Robert Cumming*, for his own use and benefit, and to remit the other moiety to *Messrs. Reid and Palmer* of *London*, merchants, who were to invest it in the funds, or upon real security, and

(a) See *Gardiner v. Fell*, ante, vol. i. p. 22.

1820.

CUMMING

v.

FORESTER:

to stand possessed of it, upon trust, for the separate use of the Plaintiff for her life, and after her death, upon trust, for her children who should attain twenty-one, be marry, and for want of such children as she should appoint, and in default of appointment, for her next of kin.

Previously to the date of the letters patent, the executors of *Johanna Lee*, conceiving that, under the settlement, *Robert Cumming* was entitled to the house No. 6. *Cossitulah* Street, had delivered it up to his agents in *India*, who sold it in *July* 1812, and remitted the proceeds, together with the rents received since the death of the testatrix, to *Robert Cumming*. The remainder of the property was afterwards sold, in *March* 1815, in pursuance of the letters patent, by *A. Colvin*. *Robert Cumming* had in the mean time become bankrupt, and *Colvin* gave credit to his assignees for a sum of 1384 rupees, which, together with what he had himself previously received from the house No. 6., amounted to one half of the proceeds of the whole of the property; the other half, amounting to 7048*l.*, he remitted to Messrs. *Bruce, Bazett*, and Co. of *London*, with directions to pay it to the Plaintiff, if under the letters patent, she was entitled to it. The assignees of *Cumming* making a claim to one half of this sum, *Bruce, Bazett*, and Co. declined paying it over to the Plaintiff or her trustees; and the bill was in consequence filed, praying that the Plaintiff might be declared entitled, and that it might be invested upon the trusts declared in the letters patent, for the benefit of herself and her children. The bill insisted, that the assignees were precluded, by the representations made by *Cumming* in the memorial and petition, from availing themselves of his right to the house No. 6., under the settlement of 1788; or that, at least,

least, they were bound to elect between that right and the benefits given him by the letters patent:

1820.
CUMMING
v.
FORESTER.

The assignees, by their answer, denied the concurrence of *Robert Cumming* in the memorial and petition; which they stated to have been presented by his sister, the Plaintiff, alone, in their joint names, while he was absent in the *Isle of Man*; they also said, that on his coming of age he had claimed the house, No. 6., and had made a conveyance of it, by lease and release, to some persons in India, by whom it was sold: It appeared, however, in evidence, that he was aware of the petition being presented, and that in *January 1813*, he had authorised an agent in *London* to concur, on his part, with the Plaintiff, in such measures as might be thought proper to be taken in recovering the property mentioned in the petition. He afterwards allowed, in account, a sum of 65*l.* for a moiety of the expenses attending the petition: In *July 1812*, he had given to his sister a general power of attorney to act for him. The conveyance which he was said to have previously made was not in evidence. The sum received by *Brace, Buzell*, and Co. had been paid into Court.

Mr. *Horne*, Mr. *Heald*, and Mr. *M. West*, for the Plaintiff.

Upon the death of *Lee* the trusts of the settlement, except as to the house, No. 6., ceased: It was erroneously supposed, that the trusts of the settlement had altogether determined; and in consequence, Mrs. *Lee* having taken a re-conveyance, considered herself absolute mistress of the whole. She took it; however, subject, as to this house, to the equitable estate tail in remainder vested in *Robert Cumming*; she was a trustee for him. On her dying without heirs, and without a

1820.
 CUMMING
 v.
 FORRESTER.

will properly attested, the estate escheated to the crown ; but, with respect to this house, the crown was trustee for *Robert Cumming*. (a) The grant, however, was procured by a representation, that the absolute title was in the crown ; this representation was made by *Cumming* ; and, after having partaken of the benefit resulting from it, he cannot be permitted to negative it and raise an adverse claim. He is estopped from denying the crown's title at the time of the grant. *Vin. Ab. tit. Estoppel. Hayne v. Malby*. (b) But if his conduct in that transaction should not be deemed conclusive, the Defendants must elect whether they will take under the grant, or will claim against it this house which it purports to convey. The will, if it had been properly attested, would have raised a case of election, and the effect of the grant which follows the will is to put the parties in the same situation, that they would have been under that instrument. The crown, if it had been informed of the state of the title to this house, would have either made *Cumming* bring it into hotchpot, or would have so arranged the grant, as to carry into effect the intention of the testatrix, by making an equal distribution.

The MASTER of the ROLLS.

In general, the consequence of any false fact being stated to the crown is to nullify any grant grounded upon it. If the crown has been deceived, and has proceeded on a mistake, that is a reason for revoking the letters patent. Then, ought not the crown to be a party ? For can the parties, by their own acts, remould the grant ? If the Defendants were put to their election, and were to elect to take under the settlement and

(a) The question, whether an estate escheating to the crown, for want of heirs of the trustee, is discharged of the trust, was not raised.

(b) 5 T. R. 438.

against

1820.
CUMMING
v.
FORESTER.

against the letters patent, then could the Plaintiff, the other grantee, insist that she must take the part granted to him, which he relinquishes? would the effect be, to cast that part upon her, or would it revert back to the crown? In cases of election in general, this strong act is done by the Court: if the party insists on retaining what he has a right to, against the instrument, the Court lays hold of the property intended for the person thus renouncing it, to make up to the disappointed donee or devisee a compensation for what he has been deprived of. But can that be done with the crown? For if the party renounces what is given him, it makes the grant inoperative as to that part, and it reverts to the crown. Perhaps the crown might, if apprized of the circumstances, grant it to the other party; but can the Court do that? It is clear the crown is not bound by a grant made under a mistake; any person might give notice of it, and have a *scire facias* to revoke these letters patent, on account of the vice appearing on the face of them.

For the Plaintiff.

It will not be the interest of either party to dispute the grant; and as it has been acted upon, the estates having been actually sold, it would be difficult, if not impossible, to revoke it now. In general, whatever the nature of the instrument may be, a party cannot take under and against it. *Moore v. Butler. (a)*

Mr. Roupell and Mr. Spurrier for the Defendants, the assignees.

We do not desire to question the validity of the grant, though it might be doubtful whether the escheat was to the crown, or to the *East India Company*; and it is not

(a) 2 Sch. & Lef. 207.

1880.

 Cumming
 v.
 Forster.

clear that the property in question ought to have been treated as freehold. There is nothing in evidence to connect Cumming with the misrepresentations contained in the memorial, so as to make him bound by them. The power of attorney was in the common form, not referring at all to this transaction; and it was not given till four years after the presentation of the memorial. The authority to the agent was not given till 1813, and was, in general terms, to do what might be necessary to recover the property, not authorising him to give up the right to this house, which Cumming had at the time sold.

Then it is argued, that this is a case of election; first, because the will of Mrs. Lee would, it is said, have compelled Cumming to elect, if it had been duly attested, for otherwise it could not. *Hearle v. Greenbank*. (a) But for that purpose it must appear on the face of the will that the intention was to pass this particular house; but here she devises two houses in *Cosistulah* Street, not mentioning the house No. 6. How can the Court know that it was meant to be included? Besides, she had a devisable interest in the house No. 6., being seized of the legal estate, and entitled to the reversion after the estate tail in Cumming. Hence, even if it had been mentioned, there would have been something to satisfy the words of the devise, without raising a case of election, which is always difficult when the devisor has any interest in the estate. *Lord Ranelcliff v. Parkins* (b), *Welby v. Welby*. (c)

Thus it would have stood upon the will; there could have been no election, and still less can there be under

(a) 3 Atk. 715. 1 Ves. sen. 306.

(c) 2 Ves. & B. 187.

(b) 6 Dow. Parl. Cas. 149.

1892.

 COMBINE
 OF
 PUBLICATIONS

the letters patent. The doctrine of election, originally applying to wills only, has been extended to deeds, and it is now sought, for the first time, to extend it still further, to the grants of the crown. But the analogy will not hold: different rules of construction prevail with respect to the grants of individuals and those of the crown, the former being taken most strongly against the grantor, the latter not. Election proceeds upon a supposed intention of the grantor or devisor, which creates an implied condition. But the crown could not intend to part with that which did not belong to it: the Court cannot impute the same intentions to it as it would to an individual. The house No. 6. is not mentioned specifically; the grant purports to convey only what had escheated, and therefore passes only such interest as the crown possessed. In *Read v. Crop* (a), the testator devised to his wife, with remainders over, his copyholds in several places, "which he had surrendered." In some of the places he had no copyhold except in right of his wife, but it was held that she was not bound to elect. In *Cull v. Showell* (b), the will was held not to raise a case of election, because it did not appear the testatrix meant to dispose of the property, if she had no power to give it. That doctrine has been over-ruled in *Whistler v. Webster* (c), on account of the difficulty of ascertaining what the party would have done, if acquainted with the extent of his power. But here there is no such difficulty, for the letters patent make it distinctly appear, that the crown would not have granted this house, if it had not supposed itself entitled to it.

The Masters of the Rolls.

The difficulty I have felt has been upon a subject not much pressed by either party, relative to the rights of the

(a) 1 Bro. C. C. 492.

(b) Amb. 727.

(c) 2 Esp. jun. 267.

1820.

CUMMING

v.

FORESTER.

A grant from the crown made under a mistake, may be recalled, notwithstanding any derivative titles depending on it.

crown, and the effect of a crown grant being made under a mistake. But I shall be glad to be relieved from this, and it is not the interest of the parties to turn the Plaintiff round upon this point, which would only render it necessary to apply for a new grant. I would rather consider the case upon the merits, freed from this difficulty, and from the jealousy with which the law regards questions involving the rights of the crown. The power of calling back its grants when made under mistake, is not like any right possessed by individuals; for when it has been deceived, the grant may be recalled notwithstanding any derivative title depending upon it; and those who have deceived it must bear the consequences. But that is foreign to the merits: the parties do not wish to raise the objection, and I do not feel bound to raise it; for it is not a case where the crown has any substantial interest; if it had, the Court would protect it, and would require that the Attorney-General should be made a party. But in the view taken of it by the parties, it may be considered as a question of private right.

Now, in that view how do the circumstances stand? Before *Johanna Lee* made her will, it was imagined that, in the events that had happened, the trusts of her settlement had ceased; and it is admitted that under that impression the surviving trustee had reconveyed to her all the property included in the settlement, treating it as hers absolutely. I think we must understand the reconveyance to have proceeded on that idea. She made her will five years afterwards, devising her houses in this street; and I think it is clear, that at that time she supposed her right to extend to the whole property, and made her will in that persuasion. A point was ingeniously suggested, that it might be understood not to pass the whole, as it might be her intention to give only so much as she had a right to. But that could not be, for it is evident

dent that she must have considered the whole to be hers, the re-conveyance being made on that supposition. If she had any idea of an invalid title to one house, it is impossible to suppose that she would have given them to her grandchildren in this manner, shewing her intention that they should share equally, when the result would be, that *Robert Cumming* would take the whole of that one house, and would then take a moiety of the rest. What equality would that be? She must have intended the will to operate upon the whole property as hers: the words are so: she gave two houses in *Cossittulah* Street; and it is not suggested in the answer, that she had more than two, or that this house, No. 6., was not one of them. If this will had been properly attested, there can be no doubt that the consequence would have been, that *Robert Cumming* must have elected; he must either have renounced his right under that settlement, or have given up the benefits conferred on him by the will. But this instrument was invalid, and could not, therefore, have the effect of putting him to his election; for we are now treating it as real estate, which it appears to have been considered all along.

1820.

 CUMMING
 v.
 FORESTER.

In 1808 the memorial was presented, representing that there was an escheat; and as the case now stands we must take it as a fact, without entering into the niceties of the law of India, that it did devolve upon the crown. The memorial and petition are in the joint names of *Robert Cumming* and his sister, and purports to be presented by both of them; they were both adult and competent to dispose of whatever interest they had. I think they have admitted the fact of his concurring in the memorial and petition; and it appears in evidence, that he paid his share of the expense; and he had given to his sister a power of attorney to act for him. I must take it, on the facts stated, that he was
 privy

1800.

 CUMMING
 v.
 ROBERTSON.

privity to and approved of the steps taken in his name to procure a grant. The petition represented, that the whole was vested in the grandmother, not mentioning that there was any other title: there is no suggestion of any right interfering with that of the crown. Why should he suppress it? Is it possible that, after concealing his title from the grantor, he can be allowed, in a court of equity, thus to set it up again? His concurrence in the application must be considered as proving that he meant to relinquish any interest he might have under the settlement. His keeping it out of the view of the crown would have been a most unfair proceeding, if he had meant afterwards to take advantage of it.

Under a persuasion of the correctness of the memorial, the crown grant is made in 1813, comprising the whole property, and adopting all the limitations of the will, and I do not see any act of *Robert Cumming's* to interfere with it. What was done in *India* was not by him, but by his agents and attorneys, without his knowledge. They sold the house, but it does not appear that he was aware of it, as it was about that time he gave the power of attorney. It does not, therefore, appear that he meant or ever thought of making any adverse claim. He afterwards becomes bankrupt, and his assignees now make this defence, being bound, for the sake of the creditors, to do the best they can. The house No. 6. was sold, and the proceeds paid to *Robert Cumming*: the rest of the property has also been sold, part of the proceeds paid to the assignees, and the rest paid into Court. The Plaintiff calls on the assignees to elect, whether they will take by the grant under the common grantor, or will give up that title, and claim under the settlement. It is certainly contrary to every principle of equity for a person to induce a gift to be made

made to himself and another in moieties, and then to set up an adverse claim to a part. On the plainest principles of morality and justice that cannot be permitted. There is here a feature in addition to the ordinary cases of election, the party himself having co-operated in inducing the crown to make this grant. That circumstance does not occur in general with wills and deeds; though they are made without the knowledge of the party, he is put to his election; for it is now established, that the doctrine of election extends to deeds. But here the grant was made with his approbation; he informed the crown that the property had been cheated. It is impossible to say that this party, having, by his representations, induced the crown to make this grant to him, can set up a title against it. It would be contrary to all analogy to the doctrine of election. The assignees certainly cannot establish the right that they contend for.

1832.
SUMMERS
v.
BOASMAN.

I felt a difficulty as to applying the doctrine of election to the crown; for the crown being always in existence may always be applied to, to set right the grant; and if the party elects to renounce what the grant has given him the consequence is, that as to that part the grant does not take effect; and then, does not that part revert to the crown? Can the Court take hold of it to make satisfaction to the other? That is my difficulty; but it would not benefit the assignees; for it is impossible that they could be allowed to participate in the fund in Court, without bringing into the account what they and the bankrupt have received.

I think it beyond a doubt that the intention of the testatrix was not to devise it as a trustee, but to give specifically this house, No. 6., and that the design of the crown

1820.
CUMMING
v.
FORRESTER.

crown was to make a grant co-extensive with the will, comprising this house. It is not like the case of *Read v. Crop* that was cited; for there the Court could restrain the will to the part that was surrendered, considering from the language the testator had used, that he did not intend to devise that which he had not surrendered; but that fails of application here, where in the will and the letters patent there is express mention of the two houses. It will probably not be the interest of either party to press any points of form: there might have been great difficulty, with respect to the crown, on the question, whether the Court could dispose of the property without a new grant being made; but that is a point not raised by the parties, and I do not feel it necessary to raise it myself.

The assignees electing to take a moiety of the whole produce, the decree declared that they were entitled accordingly.

Reg. Lib. A. 1820, fol. 641.

1820.

THORNHILL v. THORNHILL.

December 14.

THIS was a motion to open biddings, by a person who was present at the sale, supported by an affidavit, that the auctioneer (the Master's clerk) had stated, that any person would have a right to open them upon payment of all expences, and that in consequence the applicant had not bid for the estate: an advance of 50*l.* upon 410*l.* was offered.

On the part of the purchaser, it was stated that the auctioneer had declared, that the party opening the biddings must do it within eight days after the report of the purchase, and that in this case the report had been absolutely confirmed at the last seal.

Mr. *M. West*, in support of the motion.

The principle alluded to in *Tait v. Lord Northwick* (a), and adopted by the Vice Chancellor in *McCulloch v. Cotbach* (b), that a person present at the sale shall not be allowed to open biddings, because it prevents competition, cannot be sustained: the argument would go to destroy the rule altogether, as it would apply with equal force to a party not present: that circumstance was not attended to in *Rigby v. McNamara*. (c) Although the report has been confirmed, the party in this case, upon the ground of surprise, is entitled to open the biddings. *Tait v. Lord Northwick*, *Watson v. Birch*. (d)

Mr. *Girdlestone junior*, opposed the motion.

The rule in *Somner v. Charlton* (e), that a person

There is no general rule that a party present at the sale shall not open biddings; each case must depend on its own circumstances. A party who neglects to bid in consequence of the auctioneer declaring that a person may open the biddings, if he comes within eight days after the report, cannot allege surprise as a ground for opening the biddings, if he does not come within that time.

(a) 5 *Ves.* 655. (b) 3 *Madd.* 314. (c) 6 *Ves.* 117.

(d) 4 *Bro. C. C.* 171. 2 *Ves. jun.* 51. (e) Cited 5 *Ves.* 655.

present

Biggs } I. S. & S.
Rowe } 153

1890;

THORNHILL
&
THORNHILL.

present at the sale shall not open the biddings, was approved of by your Lordship in *Preston v. Barker*. (a) It had been laid down by the Vice Chancellor, in *McCulloch v. Cotbach*, as a settled principle, and had been followed by him in subsequent cases. In *Rigby v. McNamara*, the advance offered was very considerable: In the present case there was no surprise on the party: the auctioneer stated, that a person opening the biddings must apply within a given time: this has not been done.

The LORD CHANCELLOR.

I believe that the rule of opening the biddings, which was intended to protect, has frequently been very pernicious to the interests of the suitors in this Court, and that their estates have sometimes sold for next to nothing in consequence of it. But it is the practice of the Court, and it has been acted on in the case of persons who were present at the sale: that circumstance may perhaps be an objection, yet many cases might be put in which it would be impossible to act upon it as a general rule. Each case must be governed by its special circumstances: no general rule can be laid down one way or the other; but it is quite impossible to say that there is no case in which a person present at the sale shall open the biddings. The practice of the Court cannot be altered by one Judge; it may perhaps, with reference to future cases, be necessary to consider the subject with the assistance of the Master of the Rolls and the Vice Chancellor.

I think it has been held that, after the report was absolutely confirmed, the Court would not open the bid-

(a) 18 Feb. 143.

dings, unless there had been fraud on the part of the person who gets it confirmed. (a) But in the present case, the auctioneer only declared what was the rule of the Court: he stated, that any person would be at liberty to open the biddings, if he came within eight days after the report of the purchase; and the circumstance of his mentioning eight days is of great importance, as that is the rule of the Court after the report is confirmed *nisi*. A party who hears this, and does not come within that time, cannot say that he has been surprized. On this ground, if what passed has been accurately stated, the motion must be refused.

1820.

 THORNHILL
 v.
 THORNHILL.

An affidavit was made confirming this statement; and the motion was refused with costs.

(a) Vide *Morice v. Bishop of Durham*, 11 Ves. 57.

GOODHART v. LOWE.

Dec. 15, 16.

THE Plaintiff contracted to sell to the Defendant *Lowe*, twenty-five hogsheads of sugar for exportation, and to deliver them at the warehouses of the *London Dock Company*, to be shipped on board a vessel provided by the Defendant. It was agreed that the Plaintiff should pay all expences that might be incurred before they were shipped, and that the purchase-money should be paid by the Defendant upon the shipment, and before the vessel sailed. The sugars were accord-

Injunction to restrain the sailing of a vessel, containing goods sold to a person who had become insolvent, but over which the Plaintiff retained a right of stoppage *in transitu*, refused.

A court of equity has not jurisdiction in any case to stop goods *in transitu*.
Smith.

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1820.
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 GOODHART
 v.
 LOWE.

ingly delivered at the Company's warehouses, and receipts were given to the Plaintiff by the warehouse-keeper: at the request of the Defendant, they were afterwards, by an order from the Plaintiff, shipped on board a vessel of which the Defendant *Longridge* was master, and the officer of the Company took a receipt from the mate for them as coming from the Plaintiff. The Defendant *Lowe* became insolvent, without having paid for the goods; and the vessel being upon the point of sailing, the bill was filed, praying that they might be delivered to the Plaintiff, and that *Lowe* and *Longridge* might be restrained from dispatching the goods beyond the seas; it also prayed an injunction to restrain the Dock Company from permitting them to be removed from the docks, and a writ of *ne exeat regno* against *Longridge*.

The bill being supported by an affidavit, a motion was now made for the injunction: the motion had been previously made before the Vice Chancellor, who refused it.

Mr. *Wetherell* and Mr. *Stephen*, in support of the motion, insisted that the delivery of the goods was not complete, the orders being given and the receipts taken in the name of the Plaintiff. It is a general rule, that the delivery is incomplete until the bill of lading has been signed and given by the Master. In *Craven v. Ryder* (a) it was held, that a person who had sent goods by his lighterman to be shipped on board a vessel retained a right to them, until the lighter man's note had been exchanged for the bill of lading. It was also stated to be the custom of the Company to consider the

(a) 6 Taunt. 453. 2 Marsh. 127.

delivery

delivery as not complete, until the vessel had got out of the docks.

1820.
GOODHART
v.
LOWE.

The LORD CHANCELLOR.

There are customs regulating lightermen in the Thames, which do not apply to ships going abroad. I am asked to stop a vessel which is to sail to-morrow, when the propriety of doing it involves the discussion of much special law as to delivery; besides, it is not usual, in equity, to stop goods *in transitu*. I do not think I can grant the motion, but I will let you know to-morrow.

The LORD CHANCELLOR.

Dec. 16.

There is a great distinction between a delivery to a lighterman, and on board a ship. (a) If the Plaintiff has a right to the goods, he may lay his hands upon, and recover them, if he can; indeed, Mr. Justice *Buller* used to say, by any means, short of felony. But if a ship contains a cargo belonging to twenty-four persons, and *A. B.* has a right to part of it, am I, because he may bring an action of trover, for the conversion of his property, to stop the ship from sailing with the goods of the other twenty-three. Consider the danger of interfering; if, instead of this valuable cargo, there were only a single hogshead, the effect would be the same. There is no instance, that I recollect, of stopping *in transitu*, by a bill in equity; there have been many cases where questions have arisen respecting the property of the ship itself, in which the Court has interfered; but I do not remember one of stoppage *in transitu*.

(a) In *Cragen v. Ryder*, it appears that the goods were delivered on board the ship.

VOL. II.

A a

Mr.

1890.
 GOONHART
 v.
 LOWE.

Mr. *Wetherall* then suggested, that the captain might be ordered not to part with the goods; or some order might be made which would protect the Plaintiff's property in them.

The LORD CHANCELLOR.

I do not think I can do that. Why did you part with your property without obtaining payment? But what has passed shall be without prejudice to any such application. I incline to think, that the delivery in this case was not complete; but then it comes to a case of a stoppage *in transitu*, and if persons chose to part with their property under circumstances to which that right applies, the question is not, whether they may not act upon that right, or enforce it at law, but whether, in every such case, they are to have relief by a bill in equity. My objection goes to this, that, where parties think proper thus to deal with their property, it is not my business to sanction it one way or the other; and it is too much to expect the Court to take care of the property of persons who will not take care of it themselves. The question is certainly a very important one; but it would be very dangerous for this Court to assume a jurisdiction to stop *in transitu*.

Injunction refused.

THE ATTORNEY-GENERAL v. HARTLEY.

A COMMISSION of charitable uses, bearing date the 2d of July 1622, having issued into the West Riding of the county of York, an inquisition, bearing date the 2d of May 1623, was taken under it, by which the jurors found, and presented to the following effect:—

They first found, that a parcel of land, in the parish of Bingley, was, in the year 1529, conveyed to trustees, in trust, for the finding of a schoolmaster, to teach grammar, within the town of Bingley, for ever; that several houses in Bingley, with some lands belonging to them, had, together with all the rents, issues, and profits thereof, from time out of mind of man, been assigned, limited, used, and employed, for, and towards the maintenance of a schoolmaster, teaching grammar within the said town of Bingley, and that three yearly rent-charges of 15s. 4d., 12s. 4d., and 6s. 8d., had, in the year 1570, been granted to trustees, upon the same trusts. They then set forth the several documents following:—A feoffment, dated in 1402, of a tenement and the appurtenances, in trust, that the rents and yearly profits thereof should, from time to time, for ever, be employed for the maintenance of a schoolmaster, teaching grammar within the said town of Bingley, or to such other godly uses as should be thought most meet for the good and common profit of the town and parish of Bingley, and to no other use, intent,

1623, to the maintenance of a grammar school, and that decree having since been followed, the whole revenues must be applied to the use of the grammar school, at least during the continuance of a master appointed under the present system.

1819,
Dec. 14,
15, 16.
1820.
Jan. 12.
14, 25.
Dec. 18.

The Master of a free school being appointed by the persons acting as trustees, and having acted as such for many years, the validity of his appointment is not to be questioned, if he has duly executed the duties of the office.

The Master of a free grammar school permitted to take boarders to be educated in the school, but not so as to prejudice the free scholars.

Several donations partly for the support of a school, and partly for the support of a grammar school, being devoted by the commissioners of charitable uses in

1820.

ATTORNEY
GENERAL
v.
HARTLEY.

or purpose, whatsoever. A conveyance, dated in 1605, of a messuage and premises to feoffees, to the intent, that the yearly profit of all the said premises, should, yearly, from time to time, be distributed, for the maintenance of a schoolmaster, teaching grammar within the said town of *Bingley*, or to such other good and godly uses as should be thought most meet for the good and common profit of the town and parish of *Bingley*, at the discretion of the feoffees, and to no other intent. A conveyance, also dated in 1605, of a house and lands belonging to it, to the same persons, in trust, for the maintenance of a schoolmaster, teaching grammar in the said town of *Bingley*, for ever. And lastly, a conveyance dated in 1617, and made in performance of a decree of the Court of Chancery, of about sixteen acres of land, to the intent and purpose, that the rents, issues, and profits, should be employed by the feoffees, and their heirs and assigns, to the use of the poor people of *Bingley*, and towards the maintenance of a schoolmaster, in the same town of *Bingley*, for ever, according to the last will and testament of *William Wooler*, deceased, and of his intent and meaning therein declared. The will of *William Wooler* referred to, dated in 1597, directed, that 50*l.*, or thereabouts, should be bestowed on two closes, near unto *Bingley*, to the end, that the poor of *Bingley* might have their kine grassed in summer, at the half rate, and the money for the grass to go towards the maintaining of a school at *Bingley*, for ever, at the discretion of four of the honest men of the town; but Mr. *Walter Currer* was to have the placing of a schoolmaster, so long as he lived.

The inquisition next stated, that all the said lands, or the rents, issues, and profits, thereof, had been theretofore used and employed to the several and respective uses for which they were given, or had otherwise been limited

1820.

 ATTORNEY-
 GENERAL
 v.
 HARTLEY.

limited or appointed, and then, after mentioning that *Michael Broadley*, by will, dated in 1613, gave to the school of *Bingley* 40*l.*, to be disposed of at the discretion of *Nicholas Walker* and *Thomas Howgill*, the schoolmaster, his executors, and to the poor of the parish of *Bingley* 40*s.*, proceeded to find, that for the space of eighteen years then past, or thereabouts, a schoolmaster, for the teaching of the grammar unto the children of the inhabitants of the said town and parish of *Bingley*, had been kept and maintained in the said town of *Bingley*, according to the intents of the several gifts aforesaid, and that the said *Thomas Howgill* had been schoolmaster there for the space of nine or ten years then past, and having then lately obtained the vicarage of the church of *Bingley* aforesaid, and being incumbent there, had, in respect of his charge of that, and for other causes and reasons, declared before the commissioners aforesaid, at the time of taking that inquisition, relinquished and surrendered up his said office and calling of schoolmaster of the said school of *Bingley*, whereupon the said feoffees for the said school had proceeded in making choice, upon their liking, of a schoolmaster of the said school for the time present.

The decree of the commissioners, made in pursuance of the commission and inquisition, contained several orders for the regulation of the charity. *First*, Thirteen persons were named, who were, during their lives, to be the sole committees for all the said charitable uses, and they, or such others as should succeed them in their places, or the greater number of them, were to have full power to receive the rents and profits of the said lands and hereditaments, and the stocks, sums of money, debts, and other chattels, given or limited to the said charitable uses, and to dispose of them for the several

1820.

ATTORNEY-
GENERAL
W.
HARTLEY.

and respective uses to which they were limited or given; all persons who were seised of any of the said lands, were upon the request of the committees, or any four of them, to convey to the committees and their heirs, and the tenants and owners of the lands, charged with any of the said rents, as also the tenants and farmers of the lands, &c. given to the said charitable uses, were to pay the rents to the committees, or such four of them as on that behalf should be nominated by all of the committees for the time being, or the greater number of them; and the persons in whose hands any of the said stocks or sums of money might be, were to pay them to the committees. No leases were to be made for any term greater than twenty-one years, or in reversion, or without impeachment of waste, and so much rent and yearly profit at the least were to be reserved as any man should or would *bona fide* give, for the payment of which sufficient security and caution was to be taken; the said stocks were to be preserved entire, and the profits and yearly advantage arising therefrom to be bestowed to the uses to which they were given.

Secondly, The thirteen committees were every year to elect four of their number to be their stewards or bailiffs, to receive the rents, &c. and to cause them to be disposed of for the said respective charitable uses; at the end of the year, they were to render accounts to the other committees, which were to be entered in a book provided for the purpose; the book was to be kept in some safe and convenient place within the parish church of *Bingley*, under two locks and keys at the least, one of which keys was to remain with such one of the said committees, as the rest or greater number of them should nominate, and the other with the vicar of the church of *Bingley* for the time being.

Thirdly,

Thirdly, If any of the committees should die, or depart out of the country, or give up his place, or should appear in any sort to be unfaithful, or otherwise unfit or unworthy of the said place, then the residue of the committees for the time being, or the greater number of them, first deposing and removing the said unfit and unworthy persons, were to elect and choose some other fit person or persons in their place, to make the full number of thirteen committees; and the person or persons so departing, or leaving his or their place or places, or being deposed, were to release his and their right and title, in and to the said lands and premises, so as always the whole right and estate of all the said lands and premises might remain, and be in the said committees.

1690.
ATTORNEY-
GENERAL
v.
HARTLEY.

Fourthly, The inheritance and estates of the said lands were to be always so ordered and disposed of by renewing of feoffments thereof unto the said uses, as that the same might always be in all them, the said committees, or in eight of them at the least.

And for as much as by the inquisition aforesaid, it appeared, that all, or the greater part of the said lands and premises, were given and limited for the finding of a schoolmaster, to teach grammar in the said town of *Bingley*, and for that these were not laws or directions given by the said founders, either for the election or provision of a schoolmaster, or for the ordering and government of the said schoolmaster and school; so that, without some convenient course and provision in that behalf, the said lands, rents, and profits, would be utterly misemployed, or not employed according to the intent of the founders. It was, *fifthly*, ordered and decreed, that the said thirteen committees taking unto them some two or more learned and sufficient teachers within the said West

1820.

ATTORNEY-
GENERAL
v.
HARTLEY.

Riding, should, from time to time, so often as need should require, have power to elect, and nominate, and place a fit and sufficient person to be a schoolmaster of the said school; and it was declared, that such one only was fitting for the said place, as should be found first to be soundly and substantially grounded in the Christian religion established in this realm, and able and willing to instruct his scholars in the same, free from all points and tenets of popery; he was to be of a virtuous and reformed course of conversation, no light or disordered person, industrious and diligent in teaching, and moderate and discreet in his correction; and if, after he should be placed in the said place and room of a schoolmaster, he should prove to be idle or negligent, or any-ways unfit and unworthy of the said room and place, then the said thirteen committees, together with two such preachers as aforesaid assisting them, should have power to remove and put out the said schoolmaster from the said place, and to choose another in his room. And whatever the said thirteen committees, or the greater number of them, together with the said two or more preacher's assistants, should determine and do, either in the election and placing, or removing and displacing of the said schoolmaster, should stand firm and good, as if the same had been done by their unanimous consent and agreement.

Sixthly, The said thirteen committees, assisted by two such preachers as aforesaid, were, For the better education, order, and government of the said schoolmaster and scholars, to cause, and procure laws to be gathered and selected out of the laws of the schools of Queen Elizabeth at Wakefield, or of the school at Sedburgh, or any other schools where they should find any good laws established, in that behalf, or such other directions as might best serve for the ordering and government of the said

said school of *Bingley*, which laws the said commissioners did limit and appoint the said thirteen committees to see duly performed and put in execution.

1820.
ATTORNEY-
GENERAL
v.
HARTLEY.

Lastly, The decree directed, that the thirteen committees should be allowed, out of the lands, rents, and stocks of money belonging, or limited to the said several and respective charitable uses, all such charges, as they should be put to in any suit or suits whatsoever concerning the same, together with all the charges of the commission, and the execution, return, and exemplification thereof, under the Great Seal of England.

By indenture of feoffment, dated the 13th of *June*, 1671, *Samuel Sunderland* conveyed several messuages, parcels of land and hereditaments, to nine persons therein named, and their heirs, to hold to the use of himself for life, and after his decease, as to part of the premises, to the use of the Vicar of *Bingley* for ever; and as to another part of the said premises, to the use of the master of the Free Grammar School of *Bingley* aforesaid, lawfully licensed for the time being, for ever; provided that the same schoolmaster, for the time being, should pay out of the rents and profits of the said lands and tenements, the yearly sum of 4*l.* unto the usher master of the said school of *Bingley*, by equal portions, for ever; the said usher master to be nominated and elected by the upper master, and by the feoffees therein named, and their successors, or the major part of them, and lawfully licensed accordingly; and as to the remaining part of the said premises, to the use of the most indigent and necessitous poor people of the said township of *Bingley*. It was directed, that when the said nine feoffees should, by death, be decreased to the number of four, then these four should, within three months, taking advice of the vicar

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1820.

ATTORNEY-
GENERAL
v.
HARTLEY.


or minister of the said parish church for the time being, elect, nominate, and appoint nine of the most able and discreet inhabitants within the said parish, and the four surviving feoffees were to convey the premises to the said nine inhabitants so then nominated and elected; and the survivors of them to stand seized thereof as feoffees in trust for the above uses. The feoffees were, from time to time, to keep the premises in good repair.

Under the above-stated decree and feoffment, a free school had, for a long period, subsisted at *Bingley*, for the regulation of which, the present information was filed, at the relation of three of the inhabitants, against the Rev. Dr. *Hartley*, the schoolmaster, and the thirteen persons who were the present committees or trustees.

The information contained a variety of complaints against the master and the trustees, relating both to the personal conduct of the former, and to the general management of the charity. It was represented, that a deviation from the ancient usage of the school had taken place, in excluding from the course of education, instruction in the English language, writing, and arithmetic, and; in admitting to the school, a number of boarders, living in the master's house, and foreigners, or children not born of parents residing in *Bingley*. The master who was appointed in 1791, had in 1797 been presented by Lord *Loughborough*, then Lord Chancellor, to the vicarage of *Bingley*. It was insisted, in the information, that these two offices ought not to be held by the same person. It also accused the master of neglecting the education of the free scholars, and exercising undue severity towards them; it was alleged that his whole attention was devoted to the care of the boarders, who were allowed greater privileges, and who, presuming on their rank in life, were in the habit of beating and ill-treating the

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the other boys; the master was also charged with demanding money for the instruction of the free scholars. It was also alleged that the master had been suffered to have the entire management of the charity estate, that improper leases had been granted, that the directions of the decree, as to the annual election of stewards, had been neglected, and that no trustees had been regularly appointed of the lands given to the use of the charity, by *Samuel Sunderland*. The information prayed the appointment of a new schoolmaster and trustees, and that all improper leases granted by the Defendants, the trustees or pretended trustees, might be set aside, and all other acts done by them contrary to the true intent of the founder declared void; that it might be decreed, that the school was, and ought to be conducted, in future, as a school for general education, open to all boys, children of the inhabitants of the parish of *Bingley*, without distinction, and that all proper directions might be given for the due regulation and management of the said school, as a school for general education, and that it might be declared, that no boarders or foreigners ought to be taken by the schoolmaster, or admitted into the school, and that proper directions might be given as to the regular appointment of trustees and stewards of the charity estates and funds, and of the usher or ushers.

1820.

 ATTORNEY-
 GENERAL
 v.
 HARTLEY.

The answers of the master and trustees insisted, that, according to the intent of the founders, the school was to be a free grammar-school, for teaching the learned languages grammatically, open to the children of all the inhabitants of the parish of *Bingley*, legally settled there; and that, conformably to this, it had been the invariable usage not to admit any children who were not able to read sufficiently well to be put into the Latin Accidence. They contended, that the master was at liberty to take boarders, as had always been usual; and denied that the office

1820.

ATTORNEY-
GENERALv.
HARTLEY.

office was incompatible with that of vicar. The master stated, that he charged about a guinea a half year, to those of the free scholars who learned writing and accounts, for that species of instruction, and for ink, pens and paper, which, he submitted, was a proper demand, as he had, at his own expense, to provide a person to teach those subjects. There was also a charge of from 6*d.* to 1*s.* 6*d.* a half year, for coals, and the school-cleaner. All the different charges of misconduct were positively denied.

Evidence was entered into on both sides; a number of aged persons, who had formerly been scholars, were examined, as to the usage of the school in their times. The accounts they gave were, to a certain extent, contradictory, some stating that no boys were admitted till they were able to read English, while the others deposed that the younger scholars were taught the alphabet and reading, and that primers, spelling-books, and horn books, were in use. It appeared that it had been customary to make a charge for writing and accounts, and that, for at least sixty or seventy years past, the successive masters had been in the habit of taking boarders. It was proved that, by the regulations of the school of *Wakefield*, no scholars were admitted till able to read English, and to begin the *Accidence*, and that the master and usher were permitted to receive boarders. Witnesses were also examined as to the management of the school since the appointment of Dr. *Hartley*. The number of free scholars, at the time of the filing the information, in 1816, was very small, not exceeding twelve. The salary of the master amounted to about 200*l.* *per annum*, besides which, he enjoyed the use of the school-house.

In the year 1814, complaints having been made by some of the inhabitants of *Bingley*, respecting the management

nagement of the school, and the conduct of the master, the trustees determined to hold a meeting for the purpose of hearing any evidence offered in support of the charges. They, accordingly, having provided themselves with the assistance of two clergymen of the West Riding of *York*, met on the 28th *October* 1814, when however the persons who had made the complaints did not attend. On the 3d *November* following, they met again, and adopted some rules for the future regulation of the school. By these, they repealed a former order, which had permitted the usher to receive boys into the school, to be taught reading, at 5s. *per* quarter, and directed, that none should be admitted unless they could read the *Testament* sufficiently well, to be forthwith promoted to the *Latin Accidence*; they fixed the hours of attendance, and directed the course of instruction, besides classical learning, to comprise the church catechism, and reading select portions of the holy *Scriptures*, and English books of moral instruction. It was also ordered, that the scholars should not absent themselves from school, without good reason, and that they should come clean, with shoes on their feet. Some of the boys having been in the habit of coming in clogs, the inconvenience of the noise occasioned by them gave rise to the latter regulation; it was complained of as an hardship on the poorer classes.

It appeared that the directions of the decree of 1623, and the seoffment of 1671, as to keeping up the number of trustees had not been regularly complied with. In the year 1815, there was only one surviving trustee of the premises given by *S. Sunderland*; he then appointed nine others to succeed him, and conveyed the charity estates to them. As to the other part of the charity property, the number of trustees of which was fixed by the decree at thirteen, the appointments had also been irregular, there having been six vacancies in 1772, and also, at
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1820.
ATTORNEY-
GENERAL
HARTLEY.

1820.
 ATTORNEY-
 GENERAL
 v.
 HARTLEY.

other times, less than the proper number; and on the nomination of new trustees, conveyances of the legal estate had not been executed. The same persons who were trustees of the premises given by *Sunderland*, had, in general, been also trustees of the other estates. The trustees had, in the year 1807, demised a part of the charity estates to Dr. *Hartley*, for twenty-one years, at 30*l. per annum*, which did not appear to be less than the real value; out of the rent, he was to retain 20*l. per annum*, to repay himself a sum of 420*l.* expended by him in defending the title of the charity to a part of its lands.

The cause was heard on the 13th of *December*, 1818, before his Honour the Vice-Chancellor, who was pleased to decree that it should be referred to the master to inquire who are now the committees or trustees of the charity estates mentioned in the decree of the 2d of *May*, 1623, and of the charity estates comprised in the feoffment of the 15th of *June*, 1671, and in whom the legal estates are now vested; and the master was to be at liberty to state any special circumstances respecting the trustees or the estates. It was ordered, that the master should inquire, whether the estates were let, and whether the same were properly let; and also, whether it was for the benefit of the town and parish of *Bingley*, that the revenues of the school, not absolutely appropriated in the respective grants thereof to the maintaining of a grammar school, should be employed for instructing the children of the said town and parish of *Bingley* in reading, writing, or accounts. The master was also to inquire, whether it was for the benefit of the free scholars that the schoolmaster should receive boarders for instruction, or other children, who did not partake of the benefit of the free school. And whether the duties of the vicar of the
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said parish of *Bingley* were inconsistent with those of the schoolmaster of the said school?

1820.
ATTORNEY-
GENERAL
v.
HARTLEY.

From this decree the Defendants appealed, and moved to stay the proceedings pending the appeal. After hearing the motion at considerable length, the Lord Chancellor directed the appeal to be set down, and it now came on.

Mr. Hart, Mr. Wetherell, and Mr. Spence for the relators, contended, that the legal seisin of the estates not having been transmitted by conveyances from the original trustees, some interference on the part of the Court was necessary to supply that defect. It appears, that the number of trustees has been several times less than eight, by which their power of electing others was taken away; it follows, that there are not now any regularly constituted trustees; and the appointment of the master is open to the same objection.

The inquiry as to the compatibility of the offices of schoolmaster with that of vicar of *Bingley*, is founded upon the language of the commissioners' decree, and of *Sunderland's* endowment. By the former, the vicar is intrusted with the key of the documents belonging to the foundation. By the latter, distinct donations are made to the vicar and schoolmaster; the vicar is also to assist in the selection of trustees, who, when chosen, have the power of controlling the master. These provisions indicate strongly, that an union of the two characters was not contemplated.

The next ground of complaint is, that the charity has of late been converted into a school, having for its only object the reception of boarders. The endowment makes no mention of the subject, as in *Attorney-General v.*

Lord

1820.
 ATTORNEY-
 GENERAL
 v.
 HARTLEY.

Lord *Clarendon* (a), and, therefore, the practice should not be permitted, unless found to be conducive to that which ought to be the primary object of the establishment, namely, the gratuitous education of the poor. But here the result proves the mischief; the school being deserted by the free scholars, driven away partly by the neglect of the master, and partly by the insolence and ill usage of their richer companions. The evidence shows that this practice has only been recently introduced.

With reference to the branches of education to be taught, it is to be observed, that the school is supported by different endowments, several of which are for the foundation of a school generally. The revenues of these are not necessarily to be applied to education in the learned languages; and if the interest of the neighbourhood requires it, may be devoted to purposes of more general utility. If the decree of the commissioners had determined the contrary, the Court, it is conceived, might now correct it. But the evidence of that usage gives a construction to the endowments and decree, and shows that the first elements of education are to be included. The trustees are authorized to frame new regulations, and in doing so, are not bound by the reference to *Wakefield* and *Sedburgh* schools; they might have recourse to any others, and it is not uncommon for the course of education in grammar schools to comprehend reading and writing. Several instances are mentioned in Mr. *Carlisle's* work. (b)

(a) 17 *Ves.* 491.

(b) A concise description of the endowed grammar schools in *England* and *Wales*, by *Nicholas Carlisle*, F. R. S. M. R. I. A. See vol. i. p. 1. 117. 206. 722. vol. ii. p. 209. 226. 347. 353. 365. 472. 490. 501.

Mr.

1820.

ATTORNEY-
GENERAL
v.
HARTLEY.

Mr. *Heald*, Mr. *Parker*, and Mr. *Skirrow*, for the Defendants, argued that all the imputations contained in the information had been negatived by the evidence. With respect to the subjects of education, they contended, that the commissioners had not exceeded their authority in devoting the funds to a grammar school, which appeared to have existed previously to their decree. That decree, and the subsequent usage which has been conformable to it, shew that the school has always been considered to be a grammar school, and it is now well settled, that, in a grammar school, the education is confined to the learned languages. In the case of the *Attorney-General v. Whiteley (a)*, where that was decided, some part of the endowment was not limited expressly to a grammar school, but the usage gave a construction to the grant. With respect to the practice of taking boarders, they denied that any mischief had been shown to result from, and contended that the free scholars, in fact, derived advantages from the association with their superiors, and from a master being obtained of qualifications superior to those that could be expected for a small stipend, unassisted by any other source of income. They referred to the *Attorney-General v. Lord Clarendon*, and also cited the *Sutton Coldfield case (b)*, *King v. the Bishop of Chester (c)*, *Eden v. Foster (d)*, *Phillips v. Bury (e)*, *Attorney-General v. Lock (f)*, *Attorney-General v. Middleton (g)*, *Attorney-General v. Dixie. (h)*

The Lord Chancellor (*i*), after stating the prayer of the Jan. 25.
information, and the decree, observed, that it directed an

(a) 11 *Ves.* 241.

(b) 10 *Co.* 31. *Duke*, 68.

(c) 2 *Str.* 797. 2 *Burr.* 1043.

(d) 2 *P. Will.* 325.

(e) 1 *Ld. Raym.* 5. *Duke*, 245.

(f) 5 *Atk.* 164.

(g) 2 *Ves. sen.* 327.

(h) 13 *Ves.* 159.


(i) *Ex relatione.*

1820.
 ATTORNEY-
 GENERAL
 v.
 HARTLEY.

inquiry, whether it would be for the benefit of the town of *Bingley*, that the revenues of the charity, not absolutely appropriated to a grammar school, should be employed for instructing the children in reading, writing, or accounts. This refers to those words of the instruments which originally left it open to certain persons named in them, to apply those revenues to the maintenance of a grammar school, or to what are termed other godly and pious purposes. The decree directs an inquiry, whether these revenues can be applied, not to other godly and pious purposes, which may be laid before the Master in a scheme, not in the establishment of a school for general education, but in teaching reading, writing, and accounts. This would be, within the meaning of the authors of the gift, a godly and pious purpose; but it is not the habit of the Court, to determine what the godly and pious use is to which the revenues shall be applied; it leaves it to those interested to lay a plan before the Master. I think I am justified, by a most careful attention to the evidence, in saying, that whatever may be said of teaching writing and accounts in this grammar school, there is no pretence for asserting, that, according to the usage, it has been a school for teaching writing and accounts. It is quite clear that it has not.

The next inquiry is, whether it is for the benefit of the free scholars that the Master should receive boarders. It will be observed, that neither this or the preceding inquiry apply to the question, what, in point of fact, has been the usage; but it proceeds upon a principle that gives this case a great degree of importance; for, if this inquiry is to be directed here, I do not know why the same is not to be done with respect to all the grammar schools in the kingdom, in nine-tenths of which I believe boarders, or foreigners, are received. It goes upon the principle, that unless it be *de facto* for the benefit of
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the free scholars, all those schools are misconducted where the masters have admitted boarders with themselves, or foreigners boarding with others. If this principle be recognised, I do not know what is to become of many grammar schools, and of our universities, for those who are not on the several foundations are, in a sense, foreigners. But if it be the law that they ought to be excluded, that law must be administered.

1890.

 ATTORNEY-
 GENERAL
 v.
 HARTLEY.

As to the enquiry, whether the duties of vicar and schoolmaster be inconsistent, the Court knows what the duties of the vicar are without the assistance of an enquiry. There is no evidence to show the incompatibility of the offices; and it must, therefore, stand upon the instruments creating the office of schoolmaster, or on his duties as evidenced by those instruments, and the usages of the school: and I apprehend it was the business of the Court, upon the original hearing, to determine the effect of those instruments. It is difficult to say, therefore, that this enquiry should form part of the decree.

The argument has been principally directed to the question, what the usage of the school has been as to what has been taught: the doctrine stated in the *Attorney-General v. Whiteley*, namely, clinging to the usage, has been very fairly insisted on, and it has been strongly contended, that it appears from the usage, that some part of the revenues has been applied to the purpose of teaching reading, writing, and accounts. It has therefore been my duty to look at the whole evidence, but, before I state the effect of it, it is necessary to detail particularly the state of the record; for though I admit (whether I admit it with regret is of no consequence) that, in a charity case, the Court may grant the relief that should have been asked, whether it has been asked or not, yet experience justifies me in say-

1820.

ATTORNEY-
GENERALv.
HARTLEY.

Although in a charity case the proper relief may be granted, though not prayed for, yet the state of the record is to be considered with reference to the question of costs,


ing, that a more unwholesome principle could not be chosen, if it did not recollect that it must exercise a sound discretion, as to what is to be done in the matter of costs. Taking this case as an illustration, let us see how it would stand, if the Court does not take the greatest care as to the matter of costs. All the costs of these charity suits come out of the estate, that is, out of the estate of the master, a person who is only tenant for life: and can it be just that an information should be filed, involving most expensive enquiries, containing gross imputations on the conduct of individuals, and allegations not proved, upon which no relief has been given, or could be sought, and yet that the costs of all parties should be paid out of the fund which is provided for the annual maintenance of the master? It cannot be just that such should be the rule, and I desire it therefore to be understood, that though it is the duty of the Court to grant the proper relief, the terms to be imposed between the parties, as to costs, are altogether in the sound discretion of the Court.

His Lordship then stated the inquisition as set forth in the information, remarking, that, with respect to a large proportion of the gifts, the revenues were appropriated to a schoolmaster teaching grammar. As to the others, it was not necessary that there should be a grammar school only. With respect to the gifts for the maintenance of a schoolmaster, it was in the discretion of the feoffees, whether he should be a schoolmaster teaching grammar, or a master to teach the elements of other learning. And I find it laid down in *Duke*, that if there is a grant enabling trustees to build a school, without saying what sort of school, and the commissioners make it a grammar school, the Chancellor may say it shall not be a grammar school, but a school for writing (a); not

Gift to trustees to support a schoolmaster; it is in their discretion to found a grammar school, or a school for teaching other branches of learning, subject to the

(a) " If the gift be general, for the maintenance of a school, and
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that he must do so, but that he may; and I should be sorry to treat that work with disrespect, it having always been considered of great authority: the latter part derives additional authority from being written by Sergeant *Moore*, who was the drawer of the act which established these commissions.

1820.

 ATTORNEY-
 GENERAL
 v.
 HARTLEY.
 controul of
 the Court of
 Chancery.

On the other hand, if the words free grammar school have in law an appropriate sense, meaning a school in which the elements of the learned languages are taught, it becomes a matter of great consideration, how it is possible, either for commissioners, or for this Court, to apply the revenues to any other purposes than those to which the author of the charity has devoted them; and, upon looking through that history, which the world has lately been furnished with, it seems difficult, with respect to several schools, to know by what authority it is, that trustees, without the sanction of this Court, without the sanction of the King, who has so much to do with charities by his prerogative, have banished grammar altogether from the schools, and left them any thing but grammar schools. If the legislature interpose and say, that what was given to one charity shall be appropriated to another, we must bow to that; but I do not know what authority the trustees have to do it. I have heard it attributed to the doctrine of cypres, and that if a grammar school is not beneficial, it may be fit to apply the rents and profits to other purposes; but what authority is there for that? When the master of a free grammar school has been appointed, and is ready to do his duty, there is a trust to apply the rents for his benefit, and they must be so applied. It is not like the cases where the conveyance has taken away all interest from the heir-at-law, but there is no manner of applying the property

the decree be made for a grammar school, the Lord Chancellor may alter the decree, and appoint it for a writing school." *Duke*, 169.

1820.

ATTORNEY-
GENERAL
v.
HARTLEY,

to the purpose for which it was given, then not the trustees, but the King acting in the Court of Chancery, may apply the property cypres; but the trustees cannot do it of their own authority, they must resort to this Court for a sanction.

The inquisition states, that for eighteen years past there had been a schoolmaster teaching grammar according to the gifts aforesaid, from which it should seem, that there was but one school at *Bingley*, and that it was a school for the teaching of grammar, whatever these words may import. It is also recited, that all, or the greater part of the gifts were for the finding of a schoolmaster to teach grammar, but that no laws or directions had been given for the election of a schoolmaster, or for the government of the school. This also is a strong passage to show, that at that time there was only one school, and that that was a grammar school; for when the commissioners adverted to the fact that there was a school and a schoolmaster without proper provisions, requiring to be regulated, it is unaccountable that they should make no provision about any other school, if there was any other, and I therefore feel this to be very strong evidence to show, that at that time of day, the construction which had been actually put on these several grants, independently of so much of their contents as devotes a part of the revenues to the poor, did provide an application of the rents and profits of all of them, as far as the school was concerned, to one school only, that school being a grammar school. Whatever is the sense of the word, grammar school, either according to the meaning it generally imports, or according to any construction that can be put upon it by arguments from the usage at the present day, and though originally there might have been an intention to give part of the rents and profits to form different schools,

schools, and some of them not grammar schools; yet, in point of fact, the original application had been such as I have pointed out.

1820.
ATTORNEY-
GENERAL
v.
HARTLEY.

These endowments are distinct from that of *Sunderland*, which was made in 1071, and by it certain premises are given to the use of the master of the free grammar-school, at *Bingley*. This instrument shows, that, at that time, in 1671, there was only one free grammar school in *Bingley*.

His Lordship here read the charges of the information, remarking, that, as to those boys who had been taught writing and arithmetic, the question would be, whether they were taught as free scholars, or whether they paid for it; and that the evidence showed that it was no part of the duty of the master, unpaid, to teach writing and arithmetic, and that it appeared, that, as far as memory went, whether the master took boarders or not, boys boarding in *Bingley*, with other persons, were admitted into the school. The imputation against Dr. *Hartley*, of extorting money, is supported only by the circumstance of charges having been made for the education of two particular boys, it being understood and contended by him, that they were not entitled to be admitted into the school. This might, or might not, be a misconception, but to found such a charge on these facts, is really, I think, carrying it too far.

It is stated in the answer, that, according to the ancient practice and usage, foreigners, and children born of parents not residing in *Bingley*, have been admitted into the school, and that the master has taken as many boarders as he thought proper. In the evidence I find no contradiction to the allegation, that children, boarding with inhabitants of *Bingley*, have been admitted, and

1820.

ATTORNEY-
GENERAL
v.
HARTLEY.

that obliges one to consider, whether, if you destroy the right of the master to take boarders, you can leave untouched the ancient practice with respect to other persons taking boarders. I think it probable, from the evidence, that the boarders were first introduced at an early period of the mastership of Mr. *Hudson*; what is the effect of the fact of the master not having taken boarders before that time is a question to be considered by and by; but if, even up to this time, the master had received no boarders, there would be considerable difficulty in determining that, for that reason, he should not hereafter have them.

The answers then state a circumstance, to which, I think, the Court is bound to give a good deal of attention, namely, that in 1791, when Dr. *Hartley* was appointed, boarders had been taken; such was the usage at that time, and that state of things which Dr. *Hartley* found at the time of his appointment, has continued to the present time. Whether it is to continue is another question; but the Court cannot overlook the very peculiar situation in which this gentleman would be placed; for it is one thing for a parish, in a populous neighbourhood like this, upon a new election of a master, to intimate to the trustees and feoffees, that such and such is the nature of the establishment, and if you are about to elect a master, inform him what he is to expect in his situation; and it is quite a different thing to permit a master, appointed as Dr. *Hartley* was, to remain in this school, conducting himself as he has, from the year 1791 to the year 1815, and then to come to this Court, and say, *first*, you were not duly appointed, though we all permitted you to be placed in the school; *secondly*, you know nothing of the duty expected of you; and now, after you have been permitted thus to go on, we come to the Court of Chancery to reform you, and to reform the school,

On an application for the regulation of a free grammar school, the practice at that period of the appointment of the present master, to be considered during his continuance in office.

school, and at your expense. It is placing an individual in a situation which requires a great deal of attention.

1820.

ATTORNEY-
GENERAL

v.
HARTLEY.

As to removing the master, I very early understood that it was not the habit of the Court to remove a schoolmaster thus appointed. He was appointed by persons who, whether they were, or were not, the committees or feoffees with the estates rightly vested in them, were the persons *de facto* acting as trustees. At the time of the appointment, there was no interposition against their conduct; there was no interposition to lead him to suppose that he was to conduct the school upon principles different from those on which he accepted it; and I do not think it unusual in this Court, to say, that where a person has acted as schoolmaster for a considerable period, though under an undue appointment, the Court will not permit him to be removed, unless it can be shown that he ought to be removed for misconduct, which could have been justly made a ground for his discharge, if his appointment had been originally right; and in the case of *Booworth* school, the *Attorney-General v. Dixie*, such were understood to be the principles on which the Court proceeded. (a)

The first, and what appears to me to be the greatest difficulty, is that part of the information which relates to the vesting the estates in trustees duly appointed. It appears that there has been no conveyance of the estates comprised in the inquisition since 1650; they have kept up in some way, perhaps not regularly, the trusts as to *Sunderland's* estates, but I do not see how it is possible to avoid some enquiry of the nature of that directed by the first part of this decree.

The next question is, whether the offices of vicar and schoolmaster are incompatible or not, a question which,

No incompatibility in the offices of master of a free

(a) See *Foley v. Wontner*, ante, p. 247.

I think,

1820.

ATTORNEY-
GENERAL

v.

HARTLEY.

grammar
school and
vicar of the
parish.

I think, ought to be determined, and not made a subject of enquiry. A schoolmaster has his duties prescribed to him by the rules and regulations, and, if you please so to put it, by the practice of the school. If, being vicar of the parish, he cannot observe those rules and regulations, and act according to that practice, that would be a ground for his removal from the school. But looking at the duties of the offices, I have to ask, whether, as far as I know them, they are incompatible? He happens to be vicar of *Bingley*, but if he were vicar of any other place, would that be incompatible? If he neglected his duty as his vicarage, provided he performed his duty as schoolmaster, I should have nothing to do with his neglect as vicar. But if you could show that he had given so much personal attention to the vicarage as to neglect his school, the Court would dismiss him on the ground of his neglect of his duty as schoolmaster, but I cannot find any pretence for that in the evidence. If, on the other hand, it appeared that, according to the intention of the founders, the vicar of *Bingley* could not be the schoolmaster, then the Court would not have to consider whether the two offices are incompatible, but its dry, simple, naked, duty would be, to remove him on the ground of that intention. But for that purpose the intention must be clearly manifested, and though I admit, upon reading the instruments, that I think the authors of these charities did not look forward to the event of the vicar being the schoolmaster, yet I cannot collect any thing which says that he shall not, and I think, therefore, that that part of the information must be dismissed.

With respect to the boarders, this case is of great importance, and I must take it to be a case in which boarders have, in a fair sense, been recently introduced into the school, boarders I mean in the master's house, for I do not find any witness who negatives, and there are

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1820.

ATTORNEY-
GENERAL
v.
HARTLEY.

some who affirm, that the practice was to admit foreigners boarding with other persons in *Bingley*. Unless I am to say, that none are to be admitted to this school except inhabitants of *Bingley*, whether with or without relation to their settlements, or being the children of settled parents, I really do not know upon what the distinction is to turn, between boarders in Dr. *Hartley's* house, and boarders in other person's houses, unless it be the circumstance, that his attention might be more exclusively called to the former than to the latter.

Then, supposing this practice to have continued for thirty, or forty, or fifty years, or carry it as far back as any persons here speak of it, but, admitting that, previous to that period, there were no boarders, if I am to be called upon in this suit, not upon the ground of misconduct, or of too much attention being given to the boarders and too little to the scholars, to declare that those boarders, of either species, shall not be taken, or to institute such an enquiry as is here directed, I must consider what sort of a precedent I am establishing with respect to almost all the grammar schools in the kingdom; for there are very few, I believe, in which boarders are not taken; and it is the principle of the universities, in a sense, with respect to commoners and fellow commoners. If I am to say, that Dr. *Hartley* shall have no boarders in this school, I do not know why an information should not be filed in every one of those cases of grammar schools in which boarders have been received, in many instances, to the infinite benefit of the free scholars. I feel, therefore, no inclination judicially to determine that Dr. *Hartley* shall take no boarders of either species, but I am ready to admit this, that if you can make out, that either in this school or in any other, the free scholars have not the attention paid to them that they ought to have, and that there are those distinctions

sedulously

1820.

ATTORNEY-
GENERAL
v.
HARTLEY.

sedulously and anxiously, and which are still more improper, if corruptly kept up, between the free-scholars and boarders which are imputed here, that is misconduct that must be corrected; but upon the dry simple fact that boarders are taken, I do not feel inclined to direct an enquiry. On the other hand, when we know who are the proper trustees, I go the length of saying, that it will be their duty, as well as of the trustees of all schools that take boarders, to attend to whether the Master does or does not go into excess upon the subject, and whether he is introducing boarders to an extent inconvenient and prejudicial to those who must be admitted to be the primary objects of attention, and, therefore, in the terms of the decree, I shall take care to point out the principles on which I act, in each view of the case, with respect to boarders.

There is then to be considered, the question as to what has been the usage with reference to the matters taught. Although the opinion I have formed is this, that when a school is instituted as a free grammar school, without more, it is a school to teach the elements of the learned languages, yet I am ready to agree in this case, that there is enough to be found in the different instruments of endowment to have authorised those who took the property under those endowments to have instituted different schools, and schools in which matters of a different nature were to be taught; with respect to those instruments which form a fund for the maintenance of a schoolmaster, without saying what sort of schoolmaster, a master might have been appointed to teach the elements of English reading and arithmetic, or other matters of general learning. I go further than that, because, if there was an ancient free grammar school, and if at all times something more had been taught in it than merely the elements of the learned languages,

An endowment of a free grammar

languages, that usage might ingraft upon the institution a right to have a construction put upon the endowment different from what would have been put upon it if a different usage had obtained. In the case of the *Leeds* school, the instruments of endowment permitted as much of different applications as here; some were for free grammar schools, and others for a school; but I was of opinion, that it being very clear that there had never been an application of the rents and profits, or any part of the revenues of that school, to any other purpose than to the purpose of a free grammar school, that usage was quite sufficient ground for me to conclude that there had been, if I may so express myself, a legal devotion of the whole to the purposes of a free grammar school. But if I could from that usage infer, that what had been given to a school generally, was properly applied to a free grammar school, I should, if there had been a free grammar school with an usage to teach more than the elements of the learned languages, give a construction to the words, borrowed from the usage, as explanatory of them.

I think, however, in the present case, that I cannot find in the instruments prior to 1671, or in that of 1671, evidence of any usage making this other than a free grammar school; and when we look at the reference which the commissioners have made to the school of *Sedburgh*, which some of us know to have been one of the most celebrated free grammar schools in the north of *England*, (and a free grammar school only,) and the reference they have made to the school of *Wakefield*, and see the usage of both these schools, not only as to the matters taught, but as to taking boarders; and when we look at that instrument of 1623, I think it appears, that the discretion given by the prior instruments to the trustees, had been so exercised, as to join the revenues which

1820.


ATTORNEY-
GENERAL

v.

HARTLEY.

school, without more, means a school for teaching the elements of the learned languages, but an usage to teach other branches of learning may be taken as explanatory of the words, and put a different construction on them.

Several endowments partly for a school, and partly for a grammar school; held upon the ground of constant usage, that the whole had been legally devoted to the latter purpose.

1820.

 ATTORNEY-
 GENERAL
 v.
 HARTLEY.

which might have been optionally applied to other purposes, with those which could only be applied to a free grammar school originally. I am willing, however, to admit, that if you look at the subsequent evidence as far back as living memory can go, it would be too strong to say that you can collect infallibly the right inference from those documents of 1623 and 1671, when you take them as evidence with respect to the school being a free grammar school, if the evidence given by living witnesses goes to destroy the inference you draw from the instruments.

It is, therefore, necessary to examine that evidence, and it goes back as far as the year 1738 or 1739. I have taken the evidence of the persons who speak to what passed during every ten years, and compared it together, and I will state the general result of it. I think it is a point that I cannot send to an enquiry, because I do not think it possible to have more evidence, and therefore I shall state my own opinion on it, subject to any observations you may make upon the evidence. My firm conviction is, that, in this period, English reading has been taught; but I think it has been taught to an extent which has been made subservient only to the primary purpose to which the school seems to have been devoted in 1623 and 1671, that is to the teaching of the learned languages. The Defendants say, that before a boy comes to this school, he must be able to read, not so as to be master of the art of reading, but so that he may be put into the Latin accidence. The other side say, on the contrary, that the usage of the school is, that every free boy is to come supplied with an hornbook or a primer, and in this school he is to learn his A, B, C, and begin the first elements of the English language. That is the great dispute between you. Now upon looking at the whole of the evidence,
 and

and recollecting what is the fair inference to be drawn from the inquisition of 1623, and the endowment of 1671, I am decidedly of opinion, that the weight of evidence is against the notion that boys are entitled to go to this school to learn their A, B, C. I think you will find, that the evidence of those that seek to establish the contrary proposition, is contradictory in itself; you will find it given by persons who nevertheless profess to be ignorant of the rules and regulations of the school; you will find them contradicting each other, and independently of this, you will find that the great weight of credible and respectable testimony is the other way.

1820.
ATTORNEY
GENERAL
v.
HARTLEY.

I admit I think it is clearly proved, that to a certain extent, the boys learn English reading in this school, but then I say subserviently only to the other purpose, and nothing I shall do in my decree will lead to any alteration in that respect; for whilst I hold, that, for the purposes of a grammar school, it is fit that boys should go there so far capable of reading English as to be put into the Latin accidence, I do not mean that they should be such proficient as not to be called on to do that which I know to be a duty in some other grammar schools, namely, frequently to read the English Testament and Bible; nor do I mean to say that the spelling-book is not to be used, for the evidence goes to spelling-books. It is therefore I take the distinction, that I think English reading must be taught to that extent, an extent which I take to be in due subservience to the primary objects of the school as a free grammar school; but I think, that neither in 1623, when that reference is made to other schools for regulations, nor in 1671, when *Sunderland's* endowment is made, was it the purpose of the foundation, that boys should go to it to learn their A, B, C.

I feel

1820.
 ATTORNEY-
 GENERAL
 v.
 HARTLEY.

I feel obliged to Mr. *Spence* for correcting the notion I had, that it was hardly possible to find a free grammar school where boys were taught their A, B, C. I have looked through the book he mentioned, and must correct that notion. There are some free grammar schools which have afterwards, by letters patent, been partly devoted to that species of education ; but whether the letters patent were the creators of that species of education, or whether that would have been the construction of the private endowment, is another question. I agree, there are to be found instances of other grammar schools, where there have been no letters patent, in which such education has been given ; but the difficulty I have, in many of those cases, if not in all of them, is, that I do not know by what authority it is, that much of that which is stated to have been done, has been done. Supposing it were the law (and I will not say that it is not) that the King, in the Court of Chancery, could apply funds provided for one purpose to another, how is it possible to say, that that which has obtained by the mere authority of trustees, changing the original purpose for another, can be looked on by me as a legitimate precedent ? and, therefore, though I think that, to the extent to which teaching English has gone, I ought to support it, supporting it to a greater extent would be extremely mischievous.

It is said, that taking these boarders has driven the free scholars out of the school. I should feel a great difficulty in knowing what to do with the case, if that were established to my satisfaction, because, whatever it might be fit for the Court to do after Dr. *Hartley* shall cease to be Master of the school, it would be very distressing to make such an alteration with reference to Dr. *Hartley*. It could not be done justly, unless it were a matter of absolute judicial necessity. I observe, that many of the witnesses say, that, as a grammar school, this

1820.

ATTORNEY-
GENERAL
v.
HARTLEY.

this will be of no benefit to them. Now that is a consideration with which, if the loss of benefit is not improperly produced, I have nothing to do; for, if the founder thought fit to establish a grammar school, and if afterwards, from different notions about education prevailing, it becomes of much less public benefit, that is not a ground upon which a judge can alter it. He that created it had a right to determine its nature. If, therefore, the grammar school at *Bingley* has (not by the fault of any one) become of no use, the inhabitants may regret it; but I can give them no remedy whatever. That many of those grammar schools have ceased to be of that utility, which formerly resulted from the learning there taught, I am afraid we cannot doubt. I know schools in the north of *England*, which, even in my memory, were peopled with boys, where there are now, I believe, as few free scholars as in that of *Bingley*. But I cannot go the length of saying, that that has been occasioned by boarders being taken. In the first place, many of the individuals for whom the benefit was originally intended, are not persons who would now act wisely in taking advantage of it; and there are other causes, certain fashions about education, that have altered the taste of many persons. I have now gone generally through the heads of this case, and I shall hand down the minutes of the decree.

The Lord Chancellor gave out the minutes of the decree, observing, that he was of opinion, that neither writing or reading were to be introduced into the free grammar school; but if there were other funds, not absolutely appropriated to a school of that description, he thought the decree should not go to prevent the consideration whether they should be applied to the other branches of education, after the death of *Dr. Hartley*.

1820.

ATTORNEY-
GENERAL
v.
HARTLEY.

Dr. *Hartley* could not be entirely dismissed from the suit on account of the lease which he held. The inquiry respecting the occupation of the estate, and the terms upon which they were held, was necessary, in order to give validity to the appointment of trustees.

His Lordship doth declare, that the Defendant, *R. Hartley*, having been nominated head master of the school at *Bingley*, as in the pleadings is mentioned, in the year 1791, and having continued to act as such schoolmaster for many years previous to the filing of the present information, the validity of his appointment ought not to be brought into question, in case being so appointed, and having so long acted as schoolmaster, he has duly executed the duties of that office; and doth also declare, that the induction of the Defendant, *R. H.*, into the vicarage of *Bingley*, did not create any vacancy of the office of head master of the school, or require him to resign the same; that the duties of vicar, as they are by law permitted to be executed, are not incompatible with the office of head master of the school; and that there is no proof in this cause that they have been so executed in fact, as to have been incompatible therewith, nor any written evidence in this cause to establish, that the head master of the school could not hold that office if he became vicar of *Bingley*. And doth declare, that the present school of *Bingley*, in the pleadings mentioned, of which the Defendant, *R. H.*, is the head master, is a free grammar school for teaching the children of the inhabitants of *Bingley* the learned languages; and that no boy is, of right, entitled to be admitted to the said school as a free scholar therein, until he can read the New Testament, or Bible, sufficiently well, to begin, upon his admission, to learn the Latin accidence. And doth declare, that it appears from the evidence

1820.

ATTORNEY-
GENERAL
v.
HARTLEY.

dence that, for a long course of years before and since the appointment of the Defendant, *R. H.*, and during the many years in which he has acted as head master of the said school, the revenues of the said several lands and estates mentioned in the information, whether absolutely appropriated, by the respective grants thereof, to the maintenance of a grammar school, or not, is absolutely appropriated; but which, consistently with the said grants, might, or might not, be so appropriated, have, in fact, as far as appears, except as to what has been enjoyed by the poor, always been applied for the benefit of the grammar school at *Bingley*, and that such application thereof ought not to be disturbed whilst the Defendant shall continue head master of the said school. But this declaration is to be without prejudice to what may be fit to be ordered for the maintenance of any other school at *Bingley*, by competent authority, after he shall cease to be such head master of the said school, with respect to revenues not absolutely appropriated, by the grants thereof, to the maintenance of a grammar school, but, consistently therewith, applicable to the maintenance of any other distinct school. And doth also declare, that it appears, that for many years before the appointment of the said Defendant to be head master of the said school, it had been usual for the said master to take boarders to be educated in the said school; and therefore, that he, and those who appointed the said Defendant, must have understood, that he was to be at liberty to take such boarders; that so taking boarders is not inconsistent with his duty, as master of a free grammar school, unless it shall occasion a breach of duty in the neglect or improper treatment of such boys as are, of right, entitled to be free scholars in the said school, or a prejudice to them; and therefore, the Defendant, *R. H.*, is to be at liberty to take boarders, in such number, and to such extent, as shall be allowed by the persons acting as trustees

1820.

ATTORNEY-
GENERAL

v.

HARTLEY.

for the time being, and shall not occasion such neglect, improper treatment, or prejudice. And doth declare, that it is not established by the evidence in this cause, that there has been such neglect, improper treatment, or prejudice, or that such boarders have been admitted, in any number, or to an extent disapproved by the persons acting as trustees for the time being, or which has occasioned such neglect, ill treatment, or prejudice. And this Court doth think fit to dismiss the said information, with costs, to be paid by the relators, against the said Defendant, *R. H.*, as to all the matters alleged or complained of by the said information, save only as to any lease or leases of any part of the charity estates, which the said Defendant claims to hold under any such lease or leases, as to which it is ordered that further discussions and costs be reserved. And it is ordered, that the information be also dismissed, with costs to be paid by the relators to the other Defendants, as to all parts of the said information with respect to which the Defendants have been put to, or sustained costs, by reason of the allegations in the information of any misconduct or abuse against the said Defendant *R. H.*, or by the same seeking to remove him from the office of head master, either on account of his appointment not being valid, or on account of any misconduct or abuse in his office, or his having become vicar of *Bingley*, and also as to all costs which may have been occasioned or sustained by them on account of their having been charged in the said information, with collusion with the said Defendant *R. H.* And this Court doth not think fit to give any directions at present touching the rents and revenues of the charity estates, or the persons by whom the same should be received and applied, or in what manner, or by whom or to whom the same should be accounted for, until after such report shall be made, as is hereinafter directed; but that the management and application

application of the rents and revenues of the charity estates should continue to be such as the same now are, until after such report and further order; and it is ordered, that it be referred to the Master, Mr. *Thompson*, to enquire and report in whom the legal estate of the premises comprised in the decree of the 2d of *May*, 1623, is now vested, and also, who are now the trustees of the charity estates comprised in the indenture of feoffment of the 16th day of *June*, 1671, and on whom the legal estate in those estates is now vested; and it is ordered, that the said Master do enquire and state in whose occupation respectively the several charity estates were at the time of the filing the said information, and have since been and now are, and what interests the persons having the occupation thereof from time to time had, or now have, or claim therein, and how they claimed, or now claim, such interest; and the said Master is also to state under what circumstances the several charity estates, and the rents thereof, and the accounts thereof respectively, ought to be according to the several grants thereof, and the decree stated in the pleadings with respect to the trustees, committees, stewards, or others, but having due regard to the declarations made in this decree. And for the better discovery, &c. And his Lordship doth reserve the consideration of all further decisions, and also all the costs prior to the hearing not hereinbefore provided for, and also the subsequent costs of this suit until after the said Master shall have made his report, and any of the parties are to be at liberty to apply to this Court as they shall be advised.

1820.
ATTORNEY-
GENERAL
v.
HARTLEY.

Reg. Lib. A. 1819. fol. 2569.

1820.

Dec. 19.

TAYLOR v. LEIGH.

After the common injunction has been obtained, the Plaintiff may move to extend it to stay trial upon the usual affidavit, although the Defendant by the rules of the Court must put in his answer before the trial can take place.

THIS was a motion to extend the common injunction to stay trial, upon the usual affidavit.

The bill was filed in *October*, and the injunction was obtained on the 18th of *November*, on the Defendant's applying for a *dedimus* to take their answer. The present motion was made, in the first instance, before the Vice-Chancellor on the 14th of *December*, who upon being informed that the *venue* in the action was laid in *Chester*, and that the assizes for that county would not be held till *April*, thought, that as the Defendants must answer before that time, the motion was premature, and refused it, with costs.

Mr. *Hart* and Mr. *Rose*, in support of the motion, observed, that it had never been before objected that the Plaintiff had come too soon. In *Beaumont v. Field* (a), and other cases, the objection was, that he had not come earlier. The case of *Garlick v. Pearson* (b), was also mentioned.

Mr. *Koe contra*.

The LORD CHANCELLOR.

I have always understood, that you could not move for an injunction to stay trial, till the common injunction was obtained; and the reason given is, that if the Defendant puts in his answer, you may not want it. But I always understood also, that the moment the common injunction is obtained, you may go on to extend it upon the usual affidavit, unless there has been great delay, or the application is made a day or two before trial. But I do

(a) 3 *Mad.* 102. 1 *Swan.* 204.

(b) 10 *Ves.* 450.

not know how it can be said that a party comes too early, unless upon the notion, that the Defendant may put in his answer in due time; and though there may be no great mischief from that in a particular case, we must consider what would be the effect of it in other cases. Suppose, in this case, the action was to be tried at *York*, and that, on the same day this motion was made, another person files a bill to restrain an action, which is to be tried five or six weeks after at *Lancaster*, how long is he to wait after the trial of the action has been staid at *York*, before he can move to stay trial in his case? If this is to be the rule for *Chester*, there must be also one for other places; and there must be a different one with reference to each assize town on every circuit. Possibly, though it is not probable, His Majesty may order the assizes for *Chester* to be held within a week from this time.

1820.
TAYLOR
v.
LEIGH.

The Court has laid it down as a rule, that an application in a certain form is all that is required, and it will not hear the particular circumstances of the case. This, as I learn from the Register, has been the constant practice. It is the law of the Court, and it is not to be altered without considerable attention and general concurrence. The general rule and practice is, that you shall not have the order to stay trial till you have got the common injunction, and that afterwards you shall have that order upon an affidavit that you cannot safely go to trial without the Defendant's answer, and that the discovery expected to be obtained from it is likely to be useful to your defence. There are no means of knowing when you will be able to get in a full answer.

Reg. Lib. B. 1820. fol. 176.

1820.

Def. 19.

REEVE v. PARKINS.

Injunction granted to restrain payments by a Friendly Society, founded on erroneous principles, tending to exhaust its funds.

MR. *Hart* and Mr. *Teed* moved, *ex parte*, upon the filing of the bill, for an injunction to restrain the Defendants, the committee and trustees of a Friendly Society, called the Helpmate Society, from applying any of the funds to the payment of the annuities payable according to the rules, and from selling out the stock.

The bill was filed for the purpose of having the society dissolved, and was supported by affidavits showing that its rules were framed on erroneous principles; the annuities chargeable on the funds had, in consequence, become so numerous as to be likely to exhaust the whole. The case of *Pearce v. Piper* (a) was cited in support of the motion.

The Lord Chancellor granted the injunction.

Reg. Lib. B. 1820. fol. 119.

(a) 17 Ves. 1.

1820.

BRACKENBURY v. BRACKENBURY.

March 5.
Dec. 20.

IN the year 1814, *Charles Brackenbury* devised an estate in the county of *Lincoln* to his eldest son, the Plaintiff, for life, with remainders over. He afterwards executed certain indentures of lease and release, dated the 30th and 31st of *August* 1815, by which, in consideration of natural love and affection for his second son, the Defendant, and for his better maintenance and support, he conveyed the same estate to him in fee. This conveyance, it appeared, was made for the purpose of giving the Defendant a qualification to kill game.

A conveyance executed for the purpose of giving the grantee a colourable qualification to kill game remains, without being made use of, in the custody of the grantor, and after his death, of his son. The grantee afterwards obtaining the possession of it, by representing that he intended by means of it to impose upon a third person, claims the estate. A Court of Equity will not grant relief to either party. *Semble.* The decree, upon a bill filed for the delivery of the deeds, having directed the Defendant to bring an ejectment, the Plaintiff ought not to be restrained from defeating it by means of an outstanding term.

The testator died in 1816, when the Plaintiff took possession of the estate. In *October* 1817, the Defendant called on the Plaintiff, and, after stating that he had made a bet of ten guineas that he was qualified to sport, requested the Plaintiff to lend him the above writings, in order to show his qualification to the person with whom he had made the bet, promising to deliver them back immediately afterwards, and representing, that he should otherwise be obliged to pay the bet. The writings were delivered to the Defendant, and, having thus obtained possession of them, he refused to return them, and was proceeding to recover possession of the estate by ejectment. The bill alleged, that the deeds had never been delivered, but remained in the possession of the testator as escrows, and prayed that they might be delivered up to the Plaintiff, and for an injunction to restrain the action.

The Defendant represented, that the deeds were re-

After the decree, an order cannot be made on motion to restrain the setting up of outstanding terms.

gularly

1820.

 BRACKEN-
 BURY
 v.
 BRACKEN-
 BURY.

regularly executed by his father, and that the execution of them was attested in the usual manner; that living in his father's house, the latter retained possession of them as a trustee for him, and received the rents in order to reimburse himself considerable sums advanced on the Defendant's account. He also stated, that the Plaintiff having threatened to destroy the deeds, he had abstained from making any claim while they remained in his possession, but admitted that he had asked for them for the purpose mentioned in the bill, denying at the same time that he had promised to return them.

By the decree made by the Vice Chancellor on the 15th of *June* 1819, the Defendant was ordered to bring an ejectment, founded upon the indentures of *August* 1815, for the recovery of the estate; the Plaintiff undertaking to do every thing to assist the Defendant in trying it; and the Defendant was to admit, that the testator and the Plaintiff continued in possession of the estate and the deeds, and that the Defendant, except as to the promise to return the deeds, obtained possession of them as stated in the bill. (a)

On the trial, the Plaintiff set up an outstanding legal estate, and the Defendant (the Plaintiff at law) was nonsuited. An order, on motion, was afterwards made by His Honour, on the 26th of *November* 1819, directing a new trial, and that the Plaintiff should admit, that the father was seized in fee at the time of the execution of the indentures of *August* 1815.

A motion was made on the part of the Plaintiff to discharge this order.

(a) Reg. Lib. A. 1818. fol. 1513.

Mr.

Mr. *Horne*, for the Plaintiff.

Mr. *Hart*, for the Defendant.

1820.
BRACKEN-
BURY
v.
BRACKEN-
BURY.

March 5.

The Lord Chancellor said his idea was, that the bill ought to have been dismissed in the first instance. If it comes on to be heard on appeal, it will be very difficult for you to persuade me that the bill ought to have been entertained. The inclination of my opinion is; that it is not a case, in which either party has a right to apply to a court of equity. The Court ought to have said, we will have nothing to do with either of you. But if you give relief at all, it must be effectual, which the decree would not do without the addition to it made by this order. However, where the decree has directed an ejectment, without restraining the party from setting up the outstanding estate, that cannot be set right except by an appeal or a rehearing. The only question is, whether this addition to the decree, thus made upon motion, be regular or not.

The LORD CHANCELLOR.

The bill, in this cause, was filed by an elder brother, a person of the name of *Brackenbury*, against his younger brother. The former, it appeared, had, in his possession, at the time of the death of their father, certain indentures of lease and release, conveying an estate to the latter, and the purpose for which they were executed was stated to be, that, in case any information should be exhibited against him for sporting without a qualification, he might go to the chest of his father, and, by producing them, defeat any such information: the policy of the law, whether

Dec. 20.

1820.

BRACKEN-
BURYv.
BRACKEN-
BURY.

whether it is a wise one or not it is unnecessary to consider, requiring, that a man, in order to sport, should have a qualification in landed property.

The father died with these deeds in his own possession. They had been delivered, in the technical sense of the word, but not to the younger son, and the younger son, in his answer, states, that his father had been in the habit of making him certain allowances, as one of his sons, and that he retained the rents of these lands by way of reimbursing himself the advances he so made. The bill alleged, that the father made his will, by which he left the estates to his eldest son, and that some time after the death of the father, the younger son came to his elder brother, and told him that he had made a bet with *A. B.* that he was a man qualified to sport, and he desired him, in order to win that wager, to put into his hands these indentures of lease and release, that he might show them to the person with whom the wager was made. If the father executed these deeds for the purpose which the Plaintiff alleges, viz. to make a fraudulent exhibition of them (as proving the qualification of his son) to defeat any prosecution that might have taken place against him by the law of the land, if he lent himself to a purpose which was contrary to the policy of that law, it might have become a considerable question, if the younger son had got possession of these deeds, whether a court of equity would have done any thing to relieve the father.

The deeds were left in the possession of the father till his death, and the eldest son then obtains possession of them. He states in his bill that he thought it necessary to show them to his brother, to enable him to win this bet, intimating that he was very wrong in so doing, and contending that he had no qualification; but he lends himself to the

the purpose of imposing upon the person with whom the wager was made. That having been done, and whether or not the younger son was looking to any purpose beyond that which the elder son says was his pretence, he turns round, as the Plaintiff alleges, and says, Now I have got these deeds, I shall give notice to the tenants not to pay their rents to you any longer, but to pay them to me as owner of the estate; and he brings an ejectment to get into possession. *Prima facie*, with these deeds in his hands, being a conveyance from the father, who was tenant in fee, there was nothing to impede that ejectment; and the Plaintiff accordingly files his bill for an injunction and the delivery of the deeds.

1920.
BRACKEN-
BURY
v.
BRACKEN-
BURY.

Recollecting the representation that was made on both sides, perhaps it might not have been very much out of the way if a court of equity had said, We will have nothing to do with it; you may make what you can of it at law. The Court, however, directed the Defendant to try an ejectment. The parties go to trial, and the Defendant at law sets up an old outstanding estate, and defeats the ejectment; an application is afterwards made to the Court which ordered the trial, and it directs that no outstanding estate should be set up. My opinion about that is, that, in a case such as this, that order ought not to have been made. I am of opinion, that if it was right to let the ejectment decide the matter under the circumstances in which these parties stood, it was right to let it decide the matter, as it would have been decided in the actual circumstances in which they stood before the order was made; and it is a very different thing to say, there may be an equity arising out of circumstances, to prevent an individual setting up a term to defeat an ejectment, and to say, merely because an ejectment is brought, it shall not be set up. I shall therefore discharge the order for not setting up the outstanding estate, but without

1820.

BRACKEN
v.
BRACKEN
1820.

without prejudice to the Defendant's filing any bill for that purpose.

Mr. *Hart* suggested, that as the Plaintiff had been dealing with the Court, and permitting the action to go on upon the supposition that the real question between the parties was to be tried, it ought not to be affected by the circumstance of this legal estate being outstanding.

The Lord Chancellor.

The conscience of the Court ought not to be satisfied of that, unless the Court can say that the term ought not to be set up. The Plaintiff has not pledged himself not to set it up; he does not desire, at least not by his bill, to have the ejectment tried. This Court ought not to restrain a man from defeating an ejectment in any way in which he can. If the Defendant chooses to file a bill to put the term out of the way, the Court, if a proper case were made, might, perhaps, be able to relieve him; but it cannot be done on motion.

I cannot, on motion, do any thing with the original decree; but the order which was made on the motion before the Vice Chancellor must be discharged.

His Lordship doth order, that the order made in this cause, bearing date the 26th of November, 1819, be discharged; but the same is to be without prejudice to the Defendant's filing any bill for the purpose of having the outstanding estate set up by the Plaintiff put out of the way by the decree of the Court, in order that the Defendant may try with effect the action of ejectment brought by him, if he thinks proper.

Reg. Lib. A. 1820. fol. 247.

1820.

Ex parte LAVELL.

ROLLS.
Nov. 19.
Dec. 21.

THIS was a petition under the statute 56 Geo. 3. c. 60. By that act, all stock, the dividends of which shall have remained unclaimed for ten years, is directed to be transferred to the commissioners for the reduction of the national debt, and by the fifth section, the governor and deputy-governor of the Bank of *England* are empowered to direct transfers to any persons afterwards establishing a claim to such stock; if they shall not be satisfied of the justice of the claim, it is provided, that the claimant may apply, by petition, in a summary way, to the Court of Chancery or Exchequer; the petition is to be served on the Attorney-General and on the commissioners, and the Court is authorized to make such order, either for a transfer and payment of the dividends, or otherwise, relating thereto, and to the costs, as shall be just.

The Court will not, under the statute 56 G. 3. c. 60., order, on petition, a re-transfer of unclaimed stock that has been transferred to the sinking fund, when the title is disputed.

The sum prayed for by this petition stood originally in the name of one *Urquahart*; the petitioners claimed it as the executors of *Mrs. Scott*, to whom *Urquahart* had assigned it, together with other property, by an instrument called a deed of retrocession, executed according to the forms of the Scotch law; it appeared, however, that he afterwards had refused to transfer, disputing the right of *Mrs. Scott*. The petition at first stood over, on a question being made whether the Bank of *England* should have been served; but, upon inquiry, it was found not to have been usual. *Urquahart* had been served with a copy, but did not appear; he was resident in *Scotland*.

Mr. *Roupell*, in support of the petition.

Ex Parte } 3 M & C
Ram } 29

Mr.

1820.

Ex parte
LAVELL.

Mr. *Mitford*, for the commissioners.

The Master of the Rolls said, that the deed gave the petitioners an apparent right, but that if *Urquahart*, notwithstanding, insisted that they were not entitled, and had refused to transfer, their title was disputed, and it was not the intention of the act that the Court should determine upon petition between parties claiming adversely; the transfer could not, therefore, be ordered upon the petition; it could not be decided without a bill. His Honour, however, gave leave for it to stand over. (a)

(a) See *Ex parte Gillett*, 3 Madd. 28.

END OF THE SECOND PART.

REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

HIGH COURT OF CHANCERY.

Commencing in the Sittings before

EASTER TERM,

1 Geo. IV. 1820.

1820.

BLAND v. LAMB.

*Nov. 22.
Dec. 15, 16, 18.*

ON the 16th of *March* 1816, General *Lamb* made a will, which was in the following words. — “ My health does not permit me to go to *London* to have my last will and testament made in a proper form, and which I am determined to do as soon as the weather will permit; but knowing we are all mortal, and ignorant of the hour we may be called hence, I take this method of shewing the way I would have my small property disposed of. I think I am possessed of 11,300*l.* in the five *per cent.* Navy, and in the reduced fund 52,000*l.*, making in the whole 63,300*l.*, which I wish to be disposed of in the following manner; — first, I wish to leave to Mrs. *Elizabeth Bland*, widow of my uncle, Lieutenant General *Humphrey Bland*, 1000*l.* *per annum* for her natural

Bequest of personal property held a general residuary disposition, although accompanied with expressions favouring a more limited construction, and pointing only to a particular surplus beyond the property specifically mentioned.

VOL. II. D d “ life,

1820.

BLAND

v.

LAMB.

“ life, free of all deductions, for which purpose I desire
 “ the five *per cent.* Navy may remain as a fund, and
 “ whatsoever that is short of the 1000*l.* *per annum*,
 “ shall be made up from the other fund or funds.
 “ Secondly, to the family of my late nephew, *John*
 “ *Bland* Esquire, of *Blandsfort*, I leave 20,000*l.*; one
 “ thousand to his widow, one to his son *John*, the pro-
 “ prietor of *Blandsfort*: the rest to the other children,
 “ *equally divided.* Thirdly, to the widow and children
 “ of the Captain *Humphrey Bland*, I leave 10,000*l.*,
 “ one to his widow, and three to each of his daughters:
 “ if the widow should be dead, her share to be divided
 “ between the two unmarried daughters. Fourthly, to
 “ the widow and children of my late nephew, Captain
 “ *Loftus Otway Bland*, I leave 10,000*l.*, one to his
 “ widow, and the rest to his children, in equal shares;
 “ and to his brother *Thomas Bland*, and to his sister
 “ *Mrs. Cole*, 2000*l.* each. Fifthly, to my very best of
 “ friends, *Thomas Henry Lamb* Esquire, of *Fittingham*
 “ *Green*, I leave my silver blaze pan and lamp; and at
 “ the demise of *Mrs. Bland*, my silver bread-basket I
 “ leave him, likewise both my horses, with their saddles,
 “ bridles, &c.: he is to have the blaze-pan directly.
 “ Sixthly, to my servant, *James Rance*, for his faithful
 “ and great attention, I leave him one years’ wages, a
 “ suit of mourning, and all my clothes, hats, shoes,
 “ boots, shirts, stockings, handkerchiefs; in short every
 “ thing under the denomination of clothing; my double-
 “ barrelled gun I leave to my friend *Mr. Lind*, of
 “ *Bruton-street* and *Twicken*; any thing I have forgot I
 “ leave at the disposal of *Mrs. Bland* of *Isleworth*. All
 “ my wines are hers.”

He afterwards made the two following codicils:—
 “ I may have forgot many things, such as money due
 “ to me from government, &c.: if such there is, it is to
 “ be

" be thrown into the lump for the benefit of the legatees,
 " to be paid to them in the proportions. I do most
 " humbly intreat my good *Thomas Henry Lamb Esquire*
 " to act as my executor, with *Mrs. Bland*, widow of my
 " late uncle *Lientenant General H. Bland*. I leave to
 " my friend, *Mr. Lamb*, 100*l.* instead of a ring; the
 " latter part of this I wrote on the 20th day of *July*
 " 1816.

1822.

BLAND
 v.
 LAMB.

" I mean the above legacies to my family, to be in the
 " 3 per cent. reduced annuities, and not in money, and I
 " give an annuity of 12 guineas per annum to my late
 " groom, *Thomas Wilson*, for his life." — 12th Oct. 1816.

The testator died two days after the date of the last
 codicil; and only a few hours after his aunt, *Mrs. E.
 Bland*, who made a will, by which she gave to him the
 residue of her property, amounting to upwards of
 20,000*l.* At the time of his death he was also possessed
 of 11,300*l.* Navy five per cents.; 55,000*l.* three per cent.
 reduced; 1200*l.* in the hands of *Mr. Lamb*, monies due
 from government and army agents to a considerable
 amount, and other personal estate, exceeding, in the
 whole, 7000*l.*

The bill was filed by some of the pecuniary legatees
 named in the testator's will, claiming shares in the
 residue of his estate in proportion to their legacies,
 against the executor, *Mr. Lamb*, who disclaimed all
 interest in it, and against the next of kin, some of whom
 were also legatees. By a decretal order, on further
 directions, the Vice Chancellor declared that the per-
 sons whose pecuniary legacies had, by the second codicil,
 been converted into stock, were entitled to the residuary
 estate in proportion to the amount of their legacies. (s)

1820.

BLAND

v.

LAMB.

Nov. 22.

From this order the next of kin, who were not legatees, appealed.

Mr. *Pemberton* on their behalf, moved that they might be at liberty to prosecute the appeal in *forma pauperis*, and that it might be set down, mentioning the case of *Taylor v. Bouchier (b)*, where it was said that a pauper could not appeal, and remarking that it was nevertheless generally laid down, that the liberty to sue in *forma pauperis*, might be obtained in any stage of the cause.

An appeal may
be prosecuted
in *forma pau-*
peris.

The Lord Chancellor said, it was a very singular proposition that a pauper could not appeal. He could not see why, because a party was poor, the Court should not set itself right.

The usual order for setting down the appeal was made.

Motions having been made by the Appellants to stay proceedings until the hearing of the appeal, and by the Defendants, who were legatees, for payment to them of part of the funds which had been paid into Court, it was ordered, that the appeal should be advanced, and it now came on.

Mr. *Pemberton* for the Appellants.

If the bequest in the will and codicil can stand together, it is impossible that they should amount to a disposition of the residue. They may be reconciled by confining them to such things as the testator had specified in each, and this would probably be most agreeable to his intention, as in the codicil he has said nothing to denote any change with respect to the residuary bequest

in the will. The word things refers to articles of the same description as those he had just mentioned. The declaration respecting the wines, explains what the testator intended, and shows that he did not conceive that the former words included every thing.

1820.

BLAND
v.
LAMB.

If, however, the bequest in the codicil revokes, and is a substitution for that in the will, then it must be confined to what the testator has declared he meant, viz. money due from government, &c. The last words are satisfied by restraining them to monies due from his agents; the words are "if such there is," not "be," which are referable not to many things, but to money, and from the specification which accompanies them, they are not so extensive as those used in the will.

The testator could not have intended to give the residue by his will; he makes an estimate of what he calls his small property, and could, therefore, not mean to dispose of that which he could not contemplate, much less the very large property that came to him on the death of Mrs. Bland; and he could never have intended that she should take the fund out of which an annuity only is given to her. The last codicil is material; because, if the legatees took the residue, what was the use of reducing their legacies? These circumstances are conclusive with respect to the testator's intention; and if that is the case, it will controul words which *per se* would be sufficient to pass the residue. *Davers v. Davers* (a), *Attorney General v. Johnstone*. (b) The words "small remainder" in the last case were much more comprehensive than any that are to be found in the present. How could the testator forget that which he did not possess, and of which he could, therefore, have no knowledge?

(a) 3 P. Wms. 40.

(b) Amb. 517.

1899:

BEANE
v.
LAMB

Mr. Bengon and Mr. Phillimore, on the part of the Defendants, who were both legatees and next of kin, did not object to the decree.

Mr. Agar and Mr. Barber, for the Plaintiffs, insisted that the words in the first codicil, which was clearly a revocation of the residuary bequest in the will, were sufficient to pass the residue; that the Court always inclined against intestacy; and that in this case the testator had at the commencement of his will declared an intention of disposing of all his property, though he applied to it the term small; an inaccuracy which was rather in favour of the Plaintiffs' claim.

Dec. 16.

The LORD CHANCELLOR.

The question which has been submitted to my consideration in this cause is, whether by the effect of these very singular papers the general residue of the testator's personal estate is given, and to whom? It has been contended, on the one hand, that the judgment of the Court below, which considers the expression in this will (whatever may have been the intention of the testator) as sufficient, in point of legal effect, to give that residue to the persons described by the word legatees, is right; and, on the other, that, attending to all the words of this will, the gift was not intended to be of all that residue, but in the nature of a specific bequest, or, as the *Lord Chancellor* in one case calls it, a specific contingent conditional gift of the actual items that formed the remaining personal estate which the testator had at the time he made these testamentary instruments; and even that it is still more confined, and to be considered as extending only to such personal estate as the testator has mentioned in his will that he was then possessed of.

After

1820.

BLAND
v.
LAMB.

After the cases which have been referred to, there can be no doubt that a gift of the residue may have a limited operation; although the general doctrine of the Court is, that if a person gives all the rest of his personal estate or property, such a gift will not only pass that which he then has, but that which may become his property; and it will operate even in this singular way, that although a testator may probably have meant to pass nothing but what he had at the time of his will (which alone, according to the common sense of the expression, can be called his property), yet if at the time of his death he has not a single particle of that property, and has afterwards acquired other property, this last property will pass under the words *my property*. The Courts have held, whether on satisfactory grounds or not is another question, that where a person gives all his property, it shows that he did not mean to die intestate; and not meaning to die intestate as to what he had at the time of making his will, they have inferred that he did not mean to die intestate as to what he should have at the time of his death. This rule has sometimes operated with great hardship, and directly contrary to the intention of the party; but, notwithstanding that, it has been allowed to prevail.

Principles on which a residuary bequest by a person of his personal estate is extended to that which he subsequently acquires.

With respect to real estate, the general doctrine is just the other way: there the court is not able to apply the rule of intention, because the capacity of devising is limited to what the party may happen to possess at the time; and if a testator were to give not only what real estate he had, but also that which he might have, the former only would pass.

Without going through the cases, those of the *Attorney-General v. Johnson in Ambler*, and of *Davers v. Davers in P. Wms.* distinctly prove, that if the words

1820.

BLAND

v.

LAMB.

Very special words required to confine a residuary bequest to the property belonging to the testator at the date of his will.

of the will are sufficient to shew, that the testator intended only to give what he had at the time of making his will, the bequest will only have that limited effect. In the case in *Ambler* it was held, that the lapsed legacies did not fall into the residue, and that the words only described the actual surplus of what the testator had at the time. Perhaps it did not require any authority to prove, that such ought to be the construction where the intention is clear, though, in reading the cases which have been cited, one cannot resist entertaining some doubts as to some of the opinions expressed in them. In considering this will, (on the construction of which I cannot say I entertain by any means a clear opinion,) it must be recollected that a judgment has already been pronounced on it, and that very special words are required to take a bequest of the residue out of the general rule.

The testator, after alluding to the state of his health, states that he takes this method of shewing how he would have his *small* property disposed of: this expression appears to me to shew that he meant to dispose altogether of that property; and, on the other hand, it is fair to observe, that when he applies the word *small* to his property, (though some persons may not think it a very accurate description of it), he must in some measure have been contemplating what that property consisted of, because it is difficult to apply the word *small* with any degree of correctness to that, the magnitude of which he could not contemplate; it therefore excludes the idea of future property: but the question is, whether that word makes a difference sufficiently considerable to limit the application of the other expressions.

Then the testator says not that he is possessed of the funds which he mentions, but "I think I am possessed;" shewing

shewing that he was not quite certain of what he was possessed, and that uncertainty is strongly marked by other expressions in the will. Then Mrs. *Bland's* annuity, if the five *per cents.* are sufficient, is to be paid out of them; if not, it is to be made up from the other fund or funds: so that this shews he meant to dispose of the five *per cents.* he then had. But it still holds out the idea of uncertainty, not whether he had that sum in the whole, but in what fund it was; and it must be recollected, that besides the five *per cents.*, he had only before mentioned one fund. It has been argued upon this, (though it is an argument that may be applied to many cases, in which it would not hold,) that it is not very likely that it was intended to give Mrs. *Bland* the capital of the fund out of which her life annuity was secured. I believe I scarcely ever saw a will where a clause has that effect, without entertaining an individual though not a judicial persuasion, that it is contrary to the testator's intention; but it is clear, that if the testator had used the word residue, and given it to Mrs. *Bland*, it would have passed the capital, notwithstanding an annuity was carved out of it to her for life.

1820.

BLAND
v.
LAMBS.

His Lordship then proceeded to comment with great minuteness on the bequests in favour of the families of the testator's nephews, *J. H.* and *L. O. Bland*; observing, in substance, that all or some of the members of those families might have died, as Mrs. *Bland* did in his life-time; and that, with the exception of the share given to the widow of *H. Bland*, whose death in his life-time he alone contemplates, their shares, even in the case of the children, would not go over to the survivors, but would lapse, and would be undisposed of unless they passed by the residuary clause. These observations, he continued, may appear tedious, but I make them for the purpose of shewing, that the operation of every clause

1820.

BLAND

v.

LAMB.

clause in this testamentary instrument might have had an effect, which the testator probably neither contemplated or understood, and which, had he been informed of it, would most likely have much surprised him.

After the legacies, the testator gives to Mr. *Lamb*, on the demise of his wife, his silver bread-basket; and although no human being can doubt he meant her to have, and thought that she would take it for her life under these words, yet she would not be entitled to it, unless there is some subsequent clause which gives it to her; because, as the person to whom it is given would not have taken his personal estate, there is no necessary, or at least no legal inference, that she was to have it for life.

Then comes the bequest of his clothes, &c. to *J. Rance*; and if this will is to be considered throughout as a disposition of specific things, specific as to the residue, and specific as to the subject of the other bequests, then if his master had lived a year, and had got new clothes, &c., he would not have been entitled to them for his faithful and great attentions. After giving his gun, he says, any thing I have forgot I leave at the disposal of Mrs. *Bland*. This is the first very important part of this will, and it is very fair to try its effect by supposing, that the testator had died immediately after signing this instrument, having previously become entitled by the death of some one to a large property, and then putting the question, whether Mrs. *Bland*, if she had survived him, would have taken the increase of fortune. It is contended, that the testator by the word thing must have meant something *ejusdem generis* with reference to what had immediately preceded. This argument is considerably affected by the additional instrument of the 20th of *July*, 1816, because, when you look to what he means there by the words "I may have forgot many things," he

he expressly states as one of them, (and I now put the word *et cetera* out of the question, which Lord Coke says is one of much virtue), money due from government, and unquestionably there was such money due to him at the time he made the first paper. It is true, that that observation does not apply directly, if at all, to the question, whether he meant to give future acquired property; but it applies directly to the question, whether he meant to give any thing beyond what was of the same nature with the specific things there mentioned, because it proves that he meant under these words money due from government. If that money would have passed under the words in the first paper, it is clear, that the second paper, to a certain extent, revokes the effect of the first.

1820.

BLAND

v.

LAMB.

But, without considering the case in that view, it appears to me, that when a testator commences with saying, that he intends to dispose of his small property and of funds which he thinks he is possessed of, and in which he at first only gives a limited interest, his purpose, describing his property in this way, was to dispose of all he had at the time. He had not forgot that he had funds, although he might not have recollected, as indeed he intimates, the particulars of them; but whether that was the case or not, he meant to dispose of them; and because a testator did not advert to the circumstance, that there were interests in the funds which would be undisposed of, and that others might lapse, it would be too strong to say, when he professes absolutely to dispose of the funds, that such interests would not pass under these words, "any thing I have forgot;" and it would be too much to hold that that expression is to be applied only to things which he does not mention, and not to undisposed of interests in things which he does mention. It appears to me he meant to say, that every thing of both kinds was to go to Mrs. Bland. This construction

is

1820.

BLAND

v.

LAMB.

is fortified by the words used in the second instrument; they must mean that the testator might have, which amounts to a declaration that he had, forgotten to mention many things in the former paper, and, declaring himself that money due from government was one, he gives that, which, under the words "any thing I have forgot" he had given to Mrs. *Bland*, to his legatees (which would exclude her, unless she can be considered as one) in certain proportions; thereby, as it appears to me, expressly revoking the bequest in the will, and giving to the legatees every thing he then had, which would pass under the words "money due from government," &c. The words "all my wines are hers, which have been observed upon, are not unimportant; what he meant by the expressions it is difficult to determine, but they do not, I think, authorize me to say that he meant nothing but property of the same kind, when I am obliged, by the effect of the second instrument, which is his own declaration of what he meant by the words in the first, to say they included things of quite a different nature. Then he entreats Mr. *J. H. Lamb* to act as executor with Mrs. *Bland*.

When a testator has appointed executors, either they or the legatees must take his future acquired property, unless there is something in the instruments which show that that the executors were only to be trustees, because the mere appointment of executors would, whether he meant it or not, vest in them all future property, although what had passed before only applied to what he then had. Therefore, in any way of putting it, unless it can be made out from these instruments that these executors were intended to be only trustees, they must be taken to be a disposition of the testator's whole property, either by force of the gift of the property itself, or of the appointment of executors. Now in this will

will what is there to convert these executors into trustees; they have unequal and specific legacies, and it does not appear to me that they take any such benefits under the will, as will convert them into trustees. Upon the whole, the inclination of my opinion is in favour of the judgment of the *Vice Chancellor*; my sincere belief is, that this gentleman did not know one twentieth part of what his will would effect. I am not at liberty, however, to act upon that notion, but must follow the rule of law; and I do not find any expressions in this will sufficiently definite to justify me in deciding that this residuary clause should only have a limited effect.

1820.
BLAND
v.
LAMB.

Nothing has been said with respect to who are the legatees to take, and I wish that point to be argued.

Mr. *Pemberton* mentioned *Cooke v. Oakley* (a) as favouring the argument for limiting the effect of the residuary clause. In that case the words "all things not before bequeathed" were restrained to things *ejusdem generis*. The case of *Giraud v. Hanbury* (b) was opposed to the notion that the executor would take the surplus if undisposed of, and showed that where words of entreaty are used, as in this case, he will be considered a trustee. With respect to the question who are entitled under the word legatees, he contended, that there was nothing in the codicil peculiarly applicable to any particular class, and that the annuitant and the specific legatees were as much entitled as the pecuniary legatees. *Nannock v. Horton* (c), *Sibley v. Perry*. (d) The shares of those who died in the testator's lifetime had therefore lapsed.

Dec. 18.

(a) 1 P. Wms. 302.
(c) 7 Ves. 591.

(b) 5 Mer. 150.
(d) 7 Ves. 524.

Mr. Agar

1890.

BLAND
v.
LAMB.

Mr. Agar and Mr. Barber observed that the decision in *Cooke v. Oakley* turned on the circumstance of the Court considering the bequest confined to the articles which the testator had on board the ship; and that in the case cited from 8 Mer. the testator intended to dispose of all his property; but as the executors took by operation of law, and not under the disposition of the testator, that circumstance proved that they were not intended to take beneficially. They insisted that only such of the pecuniary legatees as survived were entitled to share in the residue; the testator could not have meant that a nice calculation of the value of the annuity and other specific legacies should be made, or that the specific legatees were to take in proportion to the numbers of their shoes and stockings. It was impossible to value an annuity determinable on the life of a person who was dead. In *Maitland v. Adair* (a) a devisee of real estate, who was a relation of the testator, was excluded from a share in the residue under a bequest to relations in the proportion he had bequeathed the other part of his fortune.

The Lord Chancellor did not pronounce any judgment, but observed that the year's wages given to the servant was a pecuniary legacy, and that the death of the annuitant, when the Court had ascertained who were meant by that description, would make no difference, as it would then merely become a question of value. Who were the legatees was a question depending simply on intention, and the best judgment that he could give would deserve rather the name of judicial conjecture than judicial determination.

The suit was afterwards compromised, and final judgment therefore was never given.

(a) 5 Ves. 231.

1820.

MARTIN v. MITCHELL.

MARTIN v. PEILE.

Rolls.
Feb. 17, 18. 24.
Dec. 6. 23,

ANN MITCHELL, the wife of *James Mitchell*, was entitled under the will of *Peter Peile* to the reversion in fee-simple, expectant on the deaths of *Mary Martin* (the Plaintiff) and *William Holmes* and *Betty* his wife, of an estate, consisting of a house and about 33 acres of land. By indentures of bargain and sale dated 12th March 1814, and by a fine, *J. Mitchell* and his wife mortgaged the reversionary interest of the latter to *Daniel Waller* for 150*l.* and interest; the reservation of the equity of redemption was to such person or persons, and for such intents and purposes, as *James Mitchell* and *Ann* his wife should, by any deed to be executed in the presence of and attested by two witnesses, appoint; and, in default of such appointment, as *Ann Mitchell* should by will appoint, with remainder to her in fee. By deed dated 19th Aug. 1814, the premises were charged with a further sum of 50*l.*, and interest, advanced by *Waller*.

Specific performance refused, of a contract improvidently entered into by ignorant persons.

The bill, after stating the interest of *J. Mitchell* and his wife in the estate as above, proceeded to allege that in December 1814, they were desirous of disposing of it, and advertised it for sale by public auction on the 7th January 1815, and that their solicitor *Hodgson* had written to the Plaintiff, *Mary Martin*, to apprise her of their intention. A treaty then took place between the Plaintiff and *Hodgson*, and several letters passed between them; in the course of which the latter proposed that the Plaintiff should become the purchaser for an annuity of 50*l.* a year, payable to *James Mitchell* and his wife for their lives, and the life of the survivor, and upon payment

Fried } *ID & w*
Boland } 47

1820.
MARTIN
v.
MITCHELL.

ment of 250*l.* to satisfy the mortgage debt to *Waller*, and interest and expences; it ended in an agreement for the purchase on those terms, which was concluded and put into writing on the 5th *January* 1815. It appeared that this agreement was signed by *J. Mitchell* and his wife, but not by the Plaintiff.

The bill then stated, that notwithstanding the agreement with the Plaintiff, *J. Mitchell* and his wife had caused their reversionary interest in the premises in question to be put up to sale by auction on the 7th *January*, when the Defendant, *John Peile*, was the highest bidder, and it was knocked down to him. After charging that *Peile* had notice of the prior agreement with the Plaintiff, and that the price agreed to be given by the Plaintiff was a full and adequate consideration, it prayed against *Mitchell* and his wife a specific performance, by a conveyance of their interest; and against *Peile*, that the sale to him at the auction might be declared to be void, together with an injunction to restrain the other Defendants from conveying their interest to him.

The bill was filed on the 8th of *February* 1815. The Defendants, *Mitchell* and his wife, by their answer, filed in the *April* following, denied having authorized *Hodgson's* treaty with the Plaintiff respecting the sale, excepting that one letter expressing *Mitchell's* readiness to meet the Plaintiff on the subject, had been written with his consent. They also set forth a letter from the Plaintiff to *Hodgson*, dated the 15th of *December* 1815, in which, she said, that upon consideration, she thought 50*l.* a year was too much, and she had, therefore, determined to wait the event of the sale, and take her chance there. They admitted, however, that afterwards, on the 30th of the same month, a meeting took place between
Hodg-

Hodgson and the Plaintiff, who proposed to become the purchaser upon the terms of paying off the mortgage, and charges of granting an annuity of 50*l.* On the following day, *Hodgson* communicated the offer to *Mitchell*, who immediately rejected it, and declared that he would not treat with the Plaintiff, being resolved upon a sale by auction, and they then went together to *Foster*, the solicitor of the Plaintiff, and informed him that the Plaintiff's offer was declined, and that the premises were to be sold by auction. The answer then stated, that on the 5th of *January*, the Plaintiff, with a Mr. *Walker*, being at *Harrington*, (the place where the Defendants, the *Mitchells* resided) sent for them, and told them that they were come to treat for the purchase of the estate at *Prospect*, upon which *Mitchell* said, that he had left the business of the sale of the estate to *Hodgson*; they said that *Walker* then cautioned them against the law charges that would be made by *Hodgson*, and by various menaces, persuasions, and promises of friendship on the part of the Plaintiff, used his utmost endeavours to persuade them to sell the premises to her by private contract; that he represented their interest as not worth more than 500*l.* or 600*l.*, and persuaded them that he and the Plaintiff possessed the power of preventing the public sale, and refused to give them leave to depart; by these means they were, they said, prevailed upon to sign the agreement, which was drawn up by *Walker*, without communication with any person on their behalf. They said, that under those circumstances they did not conceive themselves bound by this agreement, and in the evening of the same day, the Defendant *Peile* having made them an offer of 1200*l.* for their reversionary interest, they entered into and signed a contract to sell it to him at that price; but it was agreed that the sale by auction advertised for the 7th *January* following should still take place, and if more than

1820.

 MARTIN
 v.
 MITCHELL.

1820.

MARTIN

v.

MITCHELL.

1200*l.* should be bid, the contract was to be void; if not, *Peile* was to be the purchaser at that price. At the sale, *Walker* attended on the part of the Plaintiff, and informed the persons present of the agreement with her. The estate was knocked down to *Peile* at 1200*l.*, no one having bid more: by the conditions of sale the purchase money was to be paid in three months. The answer of the Defendant *Peile* was to the same effect as that of the *Mitchells*; they all insisted, that under the circumstances the contract with the Plaintiff was void.

In November 1815, a supplemental bill was filed against *Peile*, stating, that since putting in their answer the other Defendants, *Mitchell* and his wife, had offered to complete their contract with the Plaintiff, and had, in consequence of the offer being accepted, by a deed of appointment, executed on the 29th of May, but bearing date the 5th of January, and by fine, conveyed to her their interest in the premises; she gave her bond, with a surety for the payment of the annuity of 50*l.* a year. The bill then suggesting that the mortgage made to *Waller*, had been assigned to *Peile*, prayed that the plaintiff might be let in to redeem it and a conveyance.

By the answer to this bill, it appeared that on the 19th of January 1815, an indenture of bargain and sale was executed, by which *Waller*, the mortgagee and *J. Mitchell* and his wife conveyed and appointed the premises in question to the Defendant *Peile*; he discharged the mortgage debt, amounting, with interest, to 203*l.* 18*s.*, and paid 46*l.* 2*s.* to *Mitchell*; the rest of the 1200*l.* was to be paid at the time stipulated in the conditions of sale. This conveyance had not been mentioned in the answers to the original bill.

Witnesses were examined on both sides, to prove the documents referred to, and the value of the pre-

mises ; there was no evidence relative to the circumstances under which the agreement with the Plaintiff was signed.

1820.

MARTIN
v.
MITCHELL.

Mr. *Horne* and Mr. *Phillimore* for the Plaintiff.

Mr. *Heald* and Mr. *Bickersteth* for the Defendant *Pelle*, besides contending, that under the circumstances accompanying the agreement with the Plaintiff, the Court could not consider it to have been fairly made, insisted that it was void from the coverture of *Anh Mitchell*. It was the contract of a married woman, who was necessarily incapable of parting with her property, or doing any act to bind it, except by a fine or an execution of her power ; and it was not an execution, being made without the proper formalities. She could not be compelled to execute her power. Even if the Court could consider this as a defective execution, it would not lend its assistance unless there was a consideration ; and here there was none, for the Plaintiff did not sign the contract, and therefore was not bound to pay the annuity agreed for. It may be argued, that the difficulty is got rid of by the subsequent conveyance to *Pelle*, and that having taken with notice of the Plaintiff's contract, he may be declared a trustee for her ; but the contract of a feme covert is void for every purpose. She and those who claim under her are not even morally bound by it ; and therefore notice cannot affect the Defendant. Besides the effect of that argument would be, that the contract, though void at first, would be rendered available by an appointment being executed to other uses.

Mr. *Horne* in reply.

The contract with the Plaintiff is a defective execution of the power reserved to *Mitchell* and his wife by the

1820.

MARTIN
v.
MITCHELL.

mortgage deed, and the Court will supply the formal defects in the same way as it is in the habit of doing with other instruments executed for valuable consideration, when any of the requisite formalities have been neglected. There is as much reason for applying that doctrine to the case of a married woman as to any other case; for the only question is, whether she is able to execute it. If the property be settled to her separate use, it will be bound by her giving a bond or a promissory note, though not executed *modo et forma* as required by the power. The power here gives her a species of ownership as to which she is a feme sole. It is said that the agreement is void; but when a power such as this is given, it must be considered that it includes in it a capacity to contract in respect of the power. The object is that she may be able to sell and convey; but if she cannot contract, if nothing but an actual conveyance is effectual, no one could deal with her, and the object of the power would be defeated.

With respect to the other point, the want of signature by the Plaintiff, it was never doubted till the dictum of Lord *Redesdale*, in *Lawrenceson v. Butler* (a), that the signature of the agreement by the Defendant was sufficient to enable the Court to execute it. The point has been several times expressly decided. *Hatton v. Gray* (b), *Coleman v. Upcot* (c), *Buckhouse v. Crosby* (d), *Owen v. Davies* (e), *Seton v. Slade*. (f) Unless there is mutuality in the substance of the contract, the Court will not enforce it; but it does not follow that there must be mutuality in the signature. What was said by Lord *Redesdale* was only thrown out extra-judicially; and it has not since been acted on.

(a) 1 Sch. & Lef. 20.

(c) 5 Vin. Ab. 527. pl. 17.

(e) 1 Ves. sen. 82.

(b) 2 Ch. Ca. 164.

(d) 2 Eq. Ca. Ab. 32. pl. 44.

(f) 7 Ves. jun. 265.

The *Master of the Rolls* made some remarks upon the case, which are not inserted here, as the substance of them was incorporated in his judgment afterwards delivered: he expressed a desire that some of the points should be re-argued.

1820.
MARTIN
v.
MITCHELL.

The case was mentioned again, when, in addition to the former arguments, *Daniel v. Adams* (a) was referred to on the part of the Plaintiffs.

Dec. 6.

The MASTER of the ROLLS.

Dec. 27.

These causes, after having been a long time depending, now come on for decision; and I am rather concerned that it is necessary to decide them; as I on a former occasion threw out for the consideration of the parties, whether they would not agree upon a different course; thinking that it would be for the benefit of these poor persons, that the sale by auction of their property should not have been interrupted, and that it might even now take place. That was for the parties to consider, but as it has not been done, they are entitled to the judgment of the Court. I also stated my impression of some of the difficulties in the way of the Plaintiff's case, that seemed to have been imperfectly considered, in order to give an opportunity for further argument. Still I have heard nothing satisfactory; no new arguments have been adduced, and all the difficulties of the case remain untouched.

The original bill, which was filed in *February*, 1815, was for a specific performance, by *J. Mitchell* and his wife, of their agreement to sell to the Plaintiff their re-

(a) *Amb.* 495.

1820.
 MARTIN
 v.
 MITCHELL.

versionary interest in this property. It, therefore, calls on the Court to exercise the discretionary power which it possesses, of lending its extraordinary aid in the enforcement of a contract; and it depends upon whether the Plaintiff has made out such a clear and plain case that the Court is bound to exercise that power on her behalf. I have lately had an opportunity of explaining the principles which govern the Court in cases of specific performance; it is not, therefore, necessary to enter into them now, further than to observe that the agreement must be, as lord *Hardwicke* says, "certain, fair and just in all its parts (a);" it does not follow, if it be good in point of law, that it must be carried into execution; many circumstances may operate to induce a court of equity to refuse its assistance, though the agreement may stand the test of a court of law.

The supplemental bill is filed by the same Plaintiff, after having obtained from *Mitchell* and his wife a conveyance conformable to the agreement. But in the interim, *Mitchell* and his wife had parted with all their interest; they had conveyed to *Peile* by instruments that certainly were valid to pass the legal estate. The conveyance to the Plaintiff could pass nothing, and the supplemental suit is of no use. The question comes back to this, whether the first agreement is such as the Court ought to perform? To determine this, it is necessary to examine fully all the circumstances of the case.

His Honour, after stating and commenting on the pleadings, proceeded as follows.

The first witness is the person who attested the signature of *Mitchell* and his wife to the agreement; he proves their signature, but he is not examined as to

(a) *Burton v. Lister*, 3 Alk. 386.

any circumstances attending it; nor does the Defendant cross-examine him on the subject. The answer puts in issue, that they were induced to sign by menace and imposition; but there is an absence of proof on both sides. The conveyance to the Plaintiff is then proved; and it appears, that these people levied a fine also; though having at the time no interest. It only shews they were made instruments, one day to execute one thing, and another day another. Two land-surveyors and Mr. *Morgan* the actuary, prove the actual net value of the reversion to have been 1016*l.*, and that the annuity which the Plaintiff was to give, was worth 831*l.*, which, with the 250*l.* due on the mortgage, would have amounted to more than an equivalent. This might, under some circumstances, be a fair mode of treating it: but it is not the way in which the Court can deal with it; when it sees that a more advantageous mode of sale was about to take place, at which there were likely to be competitors. Was it advisable for these illiterate persons to sell in this manner, behind the back of their solicitor, who had advised them against a private sale? The Plaintiff knew *Hodgson* was their solicitor in this business; then, was it not reasonable and fair to give him notice that he might be present? He would then have seen whether they had before them all the information that was necessary: he would not have advised them to sign a paper not binding upon the other party. It is evident that nothing was done but to consult the interest of one side: the Plaintiff had her attorney with her to draw up this agreement. Then, can it be said that this was a proper mode of proceeding? *Hodgson* might by the 5th of *January*, have found a prospect of selling it more advantageously. It was within ten days of the sale, and any one properly advising them, would have recommended them to wait. A small advantage, if they could have gained any, would have been of great importance to them. It was clear, that if there had been a competition, *Peile*

1820.

MARTIN
v.
MORGAN.

1820.
 MARTIN
 v.
 MITCHELL.

would have been willing to give 1200*l.*; about 200*l.* more than the price that the Plaintiff was to give; and *Hodgson* says, in his evidence, that if the property had been exposed to public sale, unincumbered by any previous contract, he believes the price would have reached 1600*l.* Then, can it be said, that they were fairly dealt with, when, ignorant as they were, they were made to sign this paper, without any counterpart, and by which, if the Court were to compel them to execute it, they would lose at least 200*l.*, and perhaps 600*l.*? Was it proper for an aunt thus to use the influence that she might naturally have over her niece?

The evidence on the part of the Plaintiff goes only to the signature of the agreement and the value of the property; nothing is proved as to the concomitant circumstances. One of the witnesses for the Defendant, *Hodgson* says, that it was worth 1200*l.* and upwards, and would probably have sold for 1600*l.*; thus there is a contradiction as to the value. Another witness, *Bell*, says that it was worth 1200*l.*, and that he would have given that sum for it; and we find that *Peile* actually contracted for it at that price; then, can the Court say that it was not sold for an inadequate price? *Hodgson* says, that *Mitchell* and his wife were ignorant and illiterate persons, wholly inexperienced in matters of business; he adds, that previous to the 5th of *January*, the Plaintiff had told him that she was determined to wait the event of the sale, and he had informed her that *Mitchell* and his wife had made up their minds not to sell in private: he afterwards witnessed the contract made with *Peile* on the same day.

These are the facts in proof, under which the case is presented to the Court, and we must consider only how it stood on the 5th of *January*, for the subsequent transactions

actions are of no importance. Was the agreement with the Plaintiff so perfectly fair and certain, and with reference to all the circumstances, so just, that the Court can be satisfied that it ought to perform it? It seems to me, that the Court cannot decree the execution of it, attending to all the circumstances accompanying it, considering the age of these persons, their poverty, that they were acting without their attorney, that the property was reversionary, and that the price was not the full value. They were induced, by a person who got hold of them in the absence of their legal adviser, to make an improvident bargain, by which they would have been deprived of at least 200*l*.

1830.

 MARTIN
 v.
 MITCHELL.

Independently of these circumstances, I stated several difficult questions attending the case, to which I have received no satisfactory answer. Consider first, the nature of the interest: the estate, belonging to the wife, was mortgaged by the husband and wife to *Waller*, by two mortgages; and the equity of redemption was reserved to such uses as the husband and wife should, by deed executed in the presence of two witnesses, jointly appoint, and in default of a joint appointment to such uses as the wife should by will appoint, and in default of such appointment to the wife in fee. This raises a question that introduces the consideration of the class of cases relating to the effect of a reservation of an interest in the equity of redemption to the husband, in a mortgage made by the husband and wife, of the estate of the latter. In *Innes v. Jackson (a)*, where the equity of redemption was reserved to the husband alone, the *Lord Chancellor* was of opinion that it continued to be the wife's estate. That decision was reversed in the House of Lords; but on the ground of

(a) 16 Ves. 356. 1 Bligh, 104.

1820.

MARTIN
v.
MITCHELL.

a distinction taken by Lord *Redesdale*; who, after a review of all the authorities, came to the conclusion that there were two classes of cases, — first, where the equity of redemption is reserved to the husband and his heirs, without any appearance of an intention to resettle the estate, or alter the previous rights; secondly, where, from other circumstances independent of the reservation itself, any intention to make a new settlement appears. And that case clearly fell within the second class, for the mortgage was only for a term of years, while the conveyance extended to a limitation of new uses of the fee, shewing that it was executed for a double purpose. But it is open to consideration in this case, where the mortgage was in fee, whether there was any intention to alter the nature of the wife's estate. The reservation does not give the husband any interest; he was only to have a naked power. It might, therefore, be important to consider how far the property continued to be hers; and if it was still hers, then what was the effect of this contract under the power reserved?

The acts of a married woman, with respect to her estate, are perfectly void; she has, as is said by the *Master of the Rolls*, in *Wright v. Rutter* (a), no disposing power, though she may have a disposing mind. This agreement signed by her with her husband cannot affect her estate, and cannot give the party a right to call upon her in a court of equity to execute a conveyance to bar her if she survives, and to bind her inheritance. It was only under the power reserved by the settlement, that its validity could be contended for, and on that point I wished to be satisfied, whether being void on general principles, it was made good by the reservation of the power. I wished to know if there was

(a) 2 Ves. jun. 676.

any case in which a husband and wife having a power of appointment by deed over the wife's estate, a paper, not executed *modo et forma* pursuant to the power, was held to take effect as an appointment. If it is signed by a person competent to contract, and is for a valuable consideration, but defective in form, there is a remedy in equity, for you have a valid contract to stand upon. But with a married woman there can be no binding contract; the instrument is not good as an agreement, then how can it be said to bind her? She had a power to convey by deed, attested by two witnesses; her disability as a married woman was taken away as to that mode of proceeding; and she might, by an instrument executed with the required formalities, point out the uses to which the estate was to be conveyed, and the fine would then enure to those uses. But where the instrument is not executed according to the power, it is nothing but an agreement signed by a married woman, and as an agreement it is invalid. This is a point on which I do not mean to give a definitive opinion, because it is not necessary for the decision of this cause; but I feel that there would be very great difficulty in extending the doctrine of the Court as to defective executions to instruments signed by married women; it would be introducing quite a new line of cases. The power gives a competency to act, with certain protections, but it is a very weighty question whether it can be held that that gives a general competency.

1820.
MARTIN
v.
MITCHELL.

Husband and wife having a joint power of appointment by deed, over the wife's estate, agree in writing to sell it. A specific performance cannot be compelled against them.
Scinde.

Then, if it was only the agreement of the husband, what becomes of the Plaintiff's case? The point that the Court should compel the husband to coerce the wife to join with him in the conveyance, was abandoned. The counsel did not urge that that is the law now, and that the husband was to go to prison, if she refuses to

Under a contract by husband and wife for sale of the wife's estate, the Court will not decree him to procure her to join.

concur.

1820.

MARTIN
v.
MITCHELL.

concur. It is not necessary, therefore, to go into the class of cases upon that subject, the authority of which has been very much weakened. (a) They were much shaken by the remark of the *Lord Chancellor*, upon the difficulty of a court of equity compelling her to consent to a fine, while the Court of Common Pleas always examines her to ascertain whether she acts freely, and if they find her to be under constraint, still her consent must be taken, or the husband will be punished. (b) That point, however, is not pressed here.

A contract
signed by one
party only may
be enforced by
the other.
Semble.

Another difficulty arises from the circumstance that the agreement was not signed by the Plaintiff, but only by *Mitchell* and his wife. I do not intend to enter upon the numerous cases on the question, how far a contract signed by one party only is binding on that party. A doubt has arisen on the subject in consequence of what was said by Lord *Redesdale* in *Lawrenceson v. Butler* (c); he considered, that, unless the agreement was signed by both parties, there was a want of mutuality, which upon established principles is an objection to specific performance. The doubt I have on that is, whether there is not mutuality; the one party is to buy, and the other to sell; and the contract is therefore in its nature mutual, though not evidenced by a writing binding on both. I am aware that the subject has been re-considered, first by the *Lord Chancellor* (d), who, however, only mentioned it, without giving his own opinion, and by the late *Master of the Rolls*, who thought he should hardly be at liberty to refuse relief on that ground (e); and I do not mean to disturb the prevailing opinion that the party who has not signed may, nevertheless, file a

(a) *Morris v. Stephenson*, 7 *Ves.* 474. *Emery v. Wane*, 8 *Ves.* 505. *Howell v. George*, 1 *Mad.* 7.

(b) 8 *Ves.* 515.

(c) 1 *Sch. & Lef.* 20.

(d) 11 *Ves.* 592.

(e) *Western v. Russell*, 3 *Ves. & B.* 192-
bill,

bill, and compel an execution of the contract. It is considered that when the party files the bill he does an act that will bind him, and that from that time there is mutuality (a); and that the other party cannot plead the statute, because the words only prevent an action from being brought where the agreement is not signed by the party to be charged or his agent. As I observed before, the statute is in terms confined to actions at law, not extending to suits in equity; and the word "charge" evidently means, charged in the action. When you file a bill you attempt to charge the Defendant; and if he has signed the agreement, it is signed by the party to be charged, and it seems to follow that he cannot take advantage of the statute.

1820.

MARTIN
v.
MITCHELL.

Where a contract is signed by one party only, the other by filing a bill for a specific performance, makes it binding on himself.

If this agreement had been attempted to be enforced against the Plaintiff, as she had not signed, and as there had been no acts of part performance, the statute would have operated directly to relieve her. Then, how did the matter stand on the 5th *January*, at the time *Mitchell* and his wife made the second contract? The Plaintiff was not bound by the first contract, and there was, therefore, then no consideration moving towards them; nothing was given for their signature, there being no signature *e contra*. Then, what was there on that day, and at that hour, to make it binding on them? If under other circumstances *Ann Mitchell* would have been bound to execute their power in proper form, she was not on that 5th of *January* in a situation to be compelled so to do; for it is only when there is a valuable consideration that defects in the execution can be supplied: here there was a want of consideration to induce the Court to lend its assistance.

(a) See *Coleman v. Upcott*, 5 *Fin. Ab.* 527. *Gaskarth v. Lord Lowther*, 12 *Ves.* 107.

I wished

1820.

MARTIN

v.

MITCHELL.

Where a contract has been signed by one party only, whether he is not at liberty to recede from it, until the other party has done some act to bind himself. Q^u.

I wished it to be considered whether, the one party not having on her part done any thing to bind herself, the other is in the mean time precluded from entering into a new agreement. What mutuality is there if the one is at liberty to renounce the contract, and the other not? If she intended to bind them, she should have bound herself; but if she will reserve to herself a power to act or not to act, must they not have the same power? And then, were not they on that day in a situation in which they might repent and retract?

In looking over the cases the strongest I have found is *Buckhouse v. Crosby* (a), reported in a book of no great authority. I took some pains in searching for it in the registrar's book, but though there were some traces of it there, and in the minute book, there is not any sufficient account of it to be found. To a certain degree it answers some of the objections that arise here. One party not having signed the agreement, and the other making a new agreement; the Court relieved against it; but it is observable that it does not appear that any objection was taken from considering what was the state of things at the time when the second contract was made. But when one party, having entered into a contract that has not been signed by the other, afterwards repents and refuses to proceed in it, I should have felt great difficulty in saying that he had not a *locus penitentiae*, and was not at liberty to recede until the other had signed, or in some manner made it binding upon himself. How can the contract be complete before it is mutual? and can it be complete as to the one and not to the other?

With all these difficulties hanging over it, it is not a case for a specific performance; the parties must be left

(a) 2 Eq. Ca. Ab. 32.

to their legal remedies. On the original bill I think the Plaintiff is not entitled to a decree, and there is still less to sustain the supplemental bill. I have only to notice, that I think the Plaintiff ought to have been informed of the conveyance of the 19th *January*, which was not mentioned in the answers, and the Plaintiff may therefore have innocently filed the second bill in ignorance of it. The bills must be dismissed; but it does not appear to me to be a case for costs.

1820.
MARTIN
v.
MITCHELL.

SAUNDERS v. KING.

1821.
Jan. 15.

AN order had been made in these causes, by the *Lord Chancellor*, for the appointment of a receiver; a notice of motion to discharge that order was afterwards given by the Defendants, and by consent of the parties, it was heard before the *Vice Chancellor*. On discussion of the merits, his Honour was of opinion, that the order ought not be discharged; but made an order, giving liberty to the Defendants to propose themselves before the Master as receivers. A motion was now made on the part of the Plaintiffs to discharge the last order.

Whether the Vice Chancellor has power to hear, by consent a motion, to discharge or alter an order made by the Lord Chancellor.

Qu. The Vice Chancellor, if authorised to discharge an order of the Lord Chancellor's, is not empowered to alter it.

Mr. *Hart*, in support of the motion, contended, that the order in question was irregular, as having been made upon a notice of motion for a contrary purpose. It was not a modification of the order prayed, but quite inconsistent with it. He stated that he had offered to consent to the order that was made, upon the terms of the Defendant's paying the costs of the application; that offer was not acceded to, and his consent therefore would not support the order.

Mr. *Koe* on the other side.

The

1821.
 KENNEDY
 v.
 KINGSTON.

Rainsford. *W. Rawlins* died in the year 1807; and after his death, *Ann Rawlins* made a will, by which she appointed 250*l.*, part of the sum of 500*l.* to her daughter, *E. A. Rainsford*: 100*l.* to *C. Hawkesworth*, and the remaining 150*l.* to *Jane Walsh*. She survived her daughter *E. A. Rainsford*, and made a codicil to her will, which however did not affect the sum of 250*l.* appointed to her. She died in *November* 1812, leaving her two daughters *C. Hawkesworth* and *Jane Walsh* surviving her. *C. Hawkesworth* died in the year 1809. A suit had been instituted, having for one of its objects, to secure the legacy of 500*l.*; and a petition was now presented, praying that the rights of the parties to it might be declared.

Mr. Roupell, for *Jane Walsh* and the representative of *C. Hawkesworth*.

The share appointed to *E. A. Rainsford* has lapsed by her death, and must be divided in the same way as if it had been unappointed. The fund is given to the children, and the power is only to vary the proportions; in default of appointment, therefore, there was to be an equal division; and as it was to take effect *at* the mother's decease, those only who survived her could be objects of the power; the unappointed part is therefore divisible between them. If it vested, subject to the power, in all the children, it must have vested in them in joint-tenancy, and the two who were living at the mother's death would be entitled by survivorship.

Mr. Fonblanque for the representative of *E. A. Rainsford*, contended that there was an intention of bounty towards all the children, and that they were all entitled to participate in the lapsed share.

Mr.

Mr. Horne for the representative of *Charlotte Williams*.

The testatrix has given a mere power of appointment amongst the children, without any gift to them in default of its execution. A gift to the objects of the power in default of appointment is sometimes supplied by implication, but that is excluded here by the express gift to them in one event, namely, that of *A. Rawlins* dying before the testatrix. The 250*l.* therefore falls into the residue of the testatrix's estate.

1821.

 KENNEDY
 v.
 KINGSTON.

The MASTER of the ROLLS.

This question arises on a very short clause in a will; the sum is given to *Ann Rawlins* for her life, "and at her decease to divide it in portions as she shall choose to her children." It is first to be considered what is the import of these words, taken alone, without reference to those which follow. Two out of the four children died in the lifetime of the donee of the power, one before and the other after the execution of the appointment. The question will be, whether it is not to be construed as pointing out as the objects of bounty those only who should survive the mother; for the power given is, to divide at her decease. Then, could it be executed in favour of one who died in her lifetime? The term children is general, but as the power is to be executed at her decease, it must be for the benefit of those then capable of taking. It is, therefore, necessarily confined to children in existence at the time of her death. Therefore none but the two who have survived can take under the power; they are clearly entitled to the sums appointed to them.

The difficulty is with respect to the part as to which there is, in the events that have happened, a non-execution. There is no gift over in default of appointment, in express terms; but if the mother had died without

1821.
 KENNEDY
 v.
 KINGSTON.

A power to appoint the proportions in which definite objects are to take, tacitly includes a gift to them in default of appointment.

making any appointment, would not the children surviving her have been entitled? would they, though certainly objects of the testatrix's bounty, have taken nothing? Upon that question, the case becomes one of that class where the objects of the power are definite, and the power is only to appoint the proportions in which they are to take, without excluding any; for here the mother must have given a share to each; she could not have made an exclusive or an illusory appointment. The power, therefore, must be understood as tacitly including a provision for an equal division of the fund amongst the objects, in the event of no appointment being made. The two who survived would, therefore, be the only persons to take; they only could take under an appointment, and if no appointment were made, they would take by necessary implication.

Supposing that to be the construction, if the bequest were confined to the first clause, the next question is whether the other part makes any difference? In case of *Ann Rawlins* dying before the testatrix, the sum is to be equally divided amongst the children; and it is said that the mention of one event upon which they were to take in default of appointment, is an exclusion of any other; and that it was, therefore, not meant to go to them except upon an event that has not happened. But this does not appear to me to be a necessary consequence. She might die in the lifetime of the testatrix; she might survive and make a complete appointment; or she might survive and make an incomplete appointment. There is no provision in express terms for the event which has actually happened, of her surviving and making an incomplete appointment, or for her making no appointment at all; but that is quite consistent with the express provision for her dying before the testatrix, as in that event the fund was not disposed of by the previous part of the will.

It

It does not, therefore, seem to me that this provision annihilates the implication arising from the previous part of the sentence, which I consider as embracing a power to appoint to the children who should survive, with a gift to them in default of appointment. The two survivors, therefore, are entitled alone to the whole sum.

1821.
KENNEDY
v.
KINGSTON.

BRACE v. ORMOND.

ROLLS.
Feb. 5.

(Before the *Lord Chief Baron*, and *Master Courtenay*.)

THIS was a suit instituted by one of two residuary legatees for an account; the other residuary legatee was a Defendant. Pending the suit the Plaintiff had assigned his interest for the benefit of his creditors, and had afterwards taken the benefit of the insolvent debtors' act, in consequence of which two supplemental bills had become necessary. The cause coming on for further directions, the question was, by whom the costs of the supplemental suits were to be paid.

In a suit for an account of a residue, one of the residuary legatees having by assigning, and taking the benefit of the insolvent debtors' act, rendered two supplemental bills necessary, the additional costs to be borne by his share.

Mr. Pemberton, for the Plaintiff.

Mr. Wingfield and *Mr. Whitmarsh*, for different Defendants.

The *Lord Chief Baron* observed, that the additional expence had been occasioned by the acts of the Plaintiff in assigning and taking the benefit of the insolvent debtors' act, and therefore ought to be borne by the Plaintiff's share of the residue. (a) The other costs were to be borne by the two shares equally.

Reg. Lib. A. 1820. fo. 1217.

(a) See *Cornish v. Gest*, 2 Cox, 27.

1821.

ROLLS.
Feb. 6.

LESPINASSE v. BELL.

(Before the *Lord Chief Baron*, and *Master Courtenay*.)

On reference to appoint a manager of an estate, the Master is to fix on the fittest person, without regard to who may propose him.

THIS was a suit by an infant entitled to an undivided moiety of an estate at *Demerara*; the Defendants were the representatives of the Plaintiff's father, the consignees of the estate, and *J. Martin* and his wife, who were entitled to the other undivided moiety. It had been referred to the Master to approve of a person to be manager of the infant's share of the estate; a person was proposed on behalf of the infant; but the Defendants, *Martin* and his wife, having carried in a proposal of the person whom they employed as their manager, the Master considering the inconveniences that would arise from two persons acting in that capacity, fixed upon him. An exception was taken to the report approving him.

Mr. Heald in support of the exception, stated as the ground of it, that the Master had made the appointment, on the state of facts brought in by the Defendants: as it concerned the infant's estate, he ought not to have listened to the proposal of persons not interested for the infant. The Master is not at liberty to appoint any one not proposed by the proper parties; as in that case he might fix upon a stranger.

Mr. Horne and *Mr. Roupell* on the other side, were stopped by

The *Lord Chief Baron*, who observed, that it was the Master's duty to appoint the person whom he thought most fit, without regard to who might propose or recommend him. As to the case you put of a stranger, if the
Master

Master thinks him most fit, he would do right to appoint him. Besides, from the moment it was stated that this person was the manager appointed by the other owners, I thought the Master was most probably right. (a)

Exception overruled.

(a) See *Attorney General v. Day*, 2 *Mad.* 246.

1821.

LESPIGASSE
v.
BELL.

NORRIS'S CASE.

Feb. 8.

THE bankrupt was committed by the commissioners for not answering to their satisfaction a question put to him: having moved for a writ of *habeas corpus*, he was this day brought up. The warrant stated the question and answer to be as follows.

“ Have you not at two different periods, and both within six months previous to the issuing forth of this commission, executed two different conveyances of your estate and effects, or part thereof, to your son *John Norris*.” To this question the bankrupt refused to give any other answer except the following, “ Not to my knowledge.”

Mr. *Montagu*, for the bankrupt, argued that the answer given, taken alone, was sufficient. There might have been some conveyance executed under circumstances different from those mentioned in the question; and the commissioners should have proceeded to examine him further before they decided that he was evading the enquiry.

Mr. *Tinney*, for the assignees, contended that the bankrupt ought to have answered positively, as he must

A bankrupt, to a question whether he had not within six months previous to the commission, executed two conveyances of his estate and effects, or part thereof, to his son, answered “ Not to my knowledge.” This answer held to be satisfactory; no further questions having been put.

1821.

NORRIS'S
Case.

have known whether he had recently executed an assignment; if he had signed a deed, without knowing whether it precisely corresponded with the description in the question, he should have stated what he knew of it: but he refused to give any answer, except that stated in the warrant.

The LORD CHANCELLOR.

There is a difficulty from this circumstance, that it has, I apprehend, been ruled, that I cannot presume that the commissioners asked him to give any other answer.

I cannot help feeling a wish that they had gone on to ask some more questions, as, whether he had executed any assignment, or any instrument; and so on. A few words from them, explaining the question, must either have led to the truth, or have shewn clearly that he would not give a satisfactory answer. The law, on this subject, was originally this, that if a man said yes or no, his answer must be taken to be satisfactory, whether you believe him or not; but since the alteration which has taken place in the law, the Court has to consider whether the answer is satisfactory or not; and the rule now is, that if the answer is not to the satisfaction of the Court, he is remanded; if it is, he is discharged; a rule by which personal liberty stands in a very insecure situation; for it has happened, that where the Court of King's Bench thought the answer was quite satisfactory, the Court of Common Pleas thought it was quite unsatisfactory.

In this case, it is very likely that men, perfectly honourable, might think this answer unsatisfactory; but the question is, whether I think it so. And I must say, that I should have felt it my duty, by putting some further questions, to have given the prisoner an opportunity of explaining what he meant; thus if they had said, why,

you must know, it is clear he must have given some answer. The ground on which it appears to me that I must decide this is, that I think the answer given was satisfactory, unless some further questions were put, to ascertain whether it was so or not; and at present I am bound to believe that no other questions were asked.

The bankrupt was discharged.

1821.

Norris's
Case.

The Earl of BELFAST v. CHICHESTER and
ATTORNEY GENERAL.

Feb. 10.

ON the 1st of July 1790, the Right Honourable *Arthur Chichester*, who was the fifth Earl of *Donegal* and Viscount *Chichester* in the kingdom of *Ireland*, was created Baron *Fisherwick*, of *Fisherwick*, in *England*. The title was descendible to the heirs male of his body. He was afterwards created Marquis of *Donegal* and Earl of *Belfast* in *Ireland*, and died in 1799, leaving two sons, *George Augustus*, now Marquis of *Donegal*, and *Spencer Stanley*, commonly called Lord *Spencer Stanley Chichester*. In August 1795, the present Marquis intermarried with *Anna May*, now Marchioness of *Donegal*, and there were issue of the marriage the Plaintiff, the eldest son, and six younger sons, who were infants, and were made Defendants. Lord S. S. *Chichester* died, leaving two sons, the Defendants, *Arthur Chichester* and *George Chichester*.

A dignity is entailed on A., who dies, leaving issue two sons, B. and C. To a bill filed in the life-time of B., by his eldest son, for perpetuating evidence of his father's marriage. Demurrers by the eldest son of C., who was dead, and the Attorney-General, were allowed.

Whether a court of equity has jurisdiction to entertain a bill filed to perpetuate testimony in support of a claim to a dignity. Qu.

The bill, after mentioning these facts, stated, that upon the death of the Marquis of *Donegal*, the Plaintiff would become entitled to the several dignities before a bill to perpetuate testimony, even in the case of an entail that cannot be barred. *Semble*.

The issue in tail cannot file

mentioned,

1821.
 The Earl of
 BELFAST
 v.
 CHICHESTER.

mentioned, and especially to the dignity and title of Baron *Fisherwick*; and that the Defendants had lately set up a claim to that title, pretending that the Marquis and Marchioness did not lawfully intermarry before the birth of the Plaintiff; that *Arthur* and *George Chichester* alleged all the issue of the Marquis and Marchioness to be illegitimate; while the six younger sons alleged that a valid marriage took place subsequently to the Plaintiff's birth, and that they, or some of them, were the lawful issue of the marriage. These allegations, and the pretences in support of them, were met by various charges tending to prove the Plaintiff's legitimacy. The bill also stated, that the Attorney General made some objections to the validity of the marriage, and that he intended to dispute the Plaintiff's right to the barony in case he survived his father. It prayed that the Plaintiff might be at liberty to examine witnesses to prove that the marriage was valid in *perpetuam rei memoriam*, and that their testimony might be perpetuated, so that the Plaintiff might have the full benefit thereof, against the Defendants and the Attorney General for the time being, in any proceedings in the High Court of Parliament respecting the right to the title and dignity of Baron *Fisherwick*, or otherwise relating thereto.

To this bill the Defendants, *Arthur Chichester* and the *Attorney General*, put in general demurrers.

Mr. Wetherell and *Mr. Blake* in support of the first demurrer.

This is a bill of the first impression; it seeks to perpetuate evidence of a right which cannot be enforced. Every claim to a peerage is addressed to the king, and legally speaking, the evidence to be perpetuated must be laid before him. His Majesty now, almost *ex debito justitiæ*, refers the claim, by the advice

of the Attorney General, to the House of Lords; but still it is in his discretion to do so or not, and in some cases this course has not been pursued. Assuming, however, that it will be adopted in this case, the House refers the title to a committee of privileges, and it cannot be known whether it will be guided in the investigation by the rules of other courts. The first principle of these committees is, that they are not bound by the rules of law, or even the advice of the Judges, which is only taken for their information; they decide upon their own views of the case, and upon principles which they think just, and although they frequently adopt, they are not bound by the general rules of evidence. It may be said, that the crown being represented by the Attorney General, the committee, after what took place in the *Berkeley* case (*a*), would admit this evidence; but this Court will not allow a bill to perpetuate evidence, unless it is to be offered to some court which must accept it. In other cases, the courts to which the evidence is tendered are bound, if the witnesses are dead, to receive it; they have no discretion. But in this case, neither the king, nor a committee of the House of Lords, is bound to pay, and the Court cannot know whether they will give, any attention to it. It is quite an anomalous proceeding to file a bill before any petition has been addressed to his Majesty, to compel the crown, represented by the Attorney General to receive evidence, which is hereafter to be laid before it or a committee of the House of Lords. The House of Lords may perhaps possess powers of its own, which will enable it to perpetuate this evidence.

1821.
The Earl of
BELFAST
v.
CHICHESTER.

In the King and Queen v. *Knollys* (*b*), the Defendant, who was indicted for murder by the name of *Charles Knollys*, pleaded in abatement that he was Earl

(a) 4 *Campb.* 419.

(b) 2 *Salk.* 509.

1821.

The Earl of
BELFASTv.
CHICHESTER.

of *Banbury*; and the plea was allowed, although the House of Lords had disallowed his claim. This is almost the only case in which the question respecting a disputed title has come before an inferior court; and as the indictment was quashed, no conclusion can be drawn from it. If the Attorney General had taken issue upon the plea, the House of Lords might have said they were the proper tribunal to try this question, and have held any proceeding not before them a breach of privilege. The question, however, can only arise in other courts collaterally, and this evidence cannot be used for any of those objects for which these bills are generally filed. Suits of this description, when it is recollected that the witnesses are giving evidence for which they cannot be prosecuted, and which can only be used in case of their death, ought to be allowed with great caution, and ought not to be extended.

There is another objection, which is fatal to this bill, *viz.* that the Plaintiff has no right, present or future, vested or contingent; the dignity is entirely vested in Lord *Donegal*. In *Lord Dursley v. Fitzhardinge (a)*, both the Plaintiffs and the Defendants had vested interests. In *Smith v. Attorney General (b)*, it was held, that the next of kin could not maintain such a bill in the lifetime of the lunatic; that case, and the one of the heir apparent, who cannot have a writ *de ventre inspiciendo*, to which it was compared, are decisive of the present question. The Defendant is only heir presumptive, and would not be entitled to that writ under any circumstances, however strong; he could not perpetuate evidence until he had acquired the character of heir, and other persons having no right whatever cannot have a right to perpetuate it against him.

(a) 6 Ves. 251.

(b) Cited 6 Ves. 260.

The *Attorney General*, Mr. *Roupell*, and Mr. *Mitford*, in support of the other demurrer.

1821.
The Earl of
BELFAST
v.
CHICHESTER.

In order to entitle the Plaintiff to maintain this bill, he must shew not only an interest in himself, but also in the *Attorney General*. The Plaintiff has no interest; he may eventually become entitled as issue in tail; but the case of *Allan v. Allan* (a) has decided, that that is not sufficient. The youngest son of the tenant in tail, or the most remote descendant of the original *donee*, (the son of the Plaintiff, for instance,) has as much right to file this bill as himself. A claim to a dignity cannot be litigated in this Court, which possesses no power of determining upon it. In the *Berkeley* case, the question, whether the depositions could be read in the House of Lords, was left open. The contest is between the Plaintiffs and the Defendants; and it is immaterial to the crown which succeeds; — it is not interested in this suit. The crown, in cases of disputed titles, sometimes consults the *Attorney General*; but that is not a ground for making him a party, even where the Plaintiff has an interest.

Mr. *Sugden* and Mr. *Stephen*, in support of the bill.

If land, though only an acre in extent, be the subject of contest, a party, who has an interest in it, can perpetuate testimony, however slight or remote that interest may be, as in the instance of an estate tail, limited after six previous estates tail, or any interest, by way of executory devise, which can scarcely, by possibility, ever take effect. The cases of the heir and devisee, or next of kin of a lunatic, who, on grounds of public policy, ought not to be allowed to file such bills, are clearly distinguishable. They have not only no right to the property, but another person has a sole absolute power and dominion over it, and can and may defeat the estate

(a) 15 Ves. 137.

which

1821.

The Earl of
Belfast

v.
Chichester.

which they affect to claim. It is not because they fill a particular character, but on account of the entire ownership being in another person, that they are unable to perpetuate evidence. *Allan v. Allan* comes directly within the reason of these cases: the tenant in tail has full power to bar the issue. The same observation applies to an heir apparent; but, in that case, it must be recollected, that if the heir were to sell his expectancy, and levy a fine, the person claiming under that fine would have a right to file a bill of this description. (a) The case of the writ *de ventre inspiciendo* has no bearing on the present question, for the law has given it to the *verus hæres* only; and Lord Coke has assigned very good reasons for not extending it. (b) In *ex parte Ascough* (c), however, it appears, that the Court of Chancery, in a case relating to personal estate, made an order of a similar nature. In the case of a dignity, the possessor has no power of alienation; he cannot intercept its descent or affect the right of the persons who are to succeed: we can say with absolute certainty, that the Plaintiff, if he is the person he represents himself to be, must be entitled to this dignity on his father's death. A party having an estate limited to him, by way of executory devise, if he is living at the death of his father, to whom it is devised in fee, could file this bill, although he cannot enjoy the estate, except in the event of his surviving his father; is it possible to distinguish that case from the present?

The Court, in laying down rules with reference to new cases, is bound to look both to the public and private mischief which may result from them. The duties which the Plaintiff will have to perform, from the high station to which he may be called, and the great consequence of its

(a) 6 Ves. 261. (b) Co. Litt. 8. a. (c) Mos. 391. 2 P. Wms. 591.
being

being known, who will sustain the dignity of the house, render it highly important, that all uncertainty as to his title should be removed. It is no less so, on account of the privileges to which, as the eldest son of a peer, he is entitled;—his ability of sitting in Parliament without any other qualification; his right of precedence and of sitting behind the chair of state in the House of Lords, in order, as mentioned in Lord *Purbeck's* case (a), to accustom himself to the duties he will have to fulfil; and the important right which he possesses of being called up to the House of Peers in his father's life-time by his title, and which, it is decided, is only an acceleration of the dignity actually vested in the father, and does not operate as a new creation, depend on it. The Plaintiff has, therefore, clearly an interest in, and partakes of the dignities of his father. It would be very mischievous to make any distinction between dignities and land; it might occasion a separation of the title and the estates which support it.

1821.
The Earl of
BELFAST
v.
CHICHESTER.

There are many cases in which a suit of this description may be instituted, where a bill for relief would not be allowed. *Earl of Suffolk v. Green.* (b) It is said, if this bill could be maintained, the other children or more remote issue might file one. That would not necessarily follow from a decision in favour of an heir apparent; but on principle there would be no danger in permitting such persons, however numerous, to file a bill for the purpose of establishing their legitimacy.

It has been strongly argued, that if this evidence is perpetuated it will be of no use, because the House of Lords will not receive it. If it has power to do so, it is impossible to say *ab ante* that it will not. The Court has

(a) *Shore. P. C.* 1.

(b) Cited 6 *Ves.* 255., reported 1 *Atk.* 450.

allowed

1821.
 {
 The Earl of
 BELFAST
 v.
 CHICHESTER.

allowed these bills in aid of a foreign jurisdiction (a), though it has no means of knowing whether the evidence will be admitted. A bill of this nature will lie in aid of proceedings before the king in council; thus in the case of Earl of *Derby* v. Duke of *Athol* (b), in which a plea to the jurisdiction was put in to a bill relating to the title to the *Isle of Man*, Lord *Hardwicke* says, "but " I will not hold the jurisdiction of the king in council " to be of such a nature as to be below the being aided " by this Court to give relief to come at that discovery." It is no objection, therefore, that the evidence may not be received or may not be acted upon; to bring this Court into action, it is sufficient that the question may be litigated. The *Berkeley* case shows that the House of Lords, if the Attorney General had been a party to the suit, would have received the depositions which had been taken in the Chancery suit, otherwise it would have been useless to have put any questions to the judges. It was, at least, a pledge on the part of the House that, if the judges had been of another opinion with respect to land, the question of admissibility would have been made the subject of deliberation. It is to avoid the objections taken in that case, that the Attorney General is made a Defendant. In all suits in which the crown and the public are interested he ought to be made a party, and is the proper officer to watch these proceedings; there are no other means of enabling the Plaintiff to use the evidence for the purpose of ascertaining his title to the dignity. The petition which is presented by a person claiming a peerage is generally referred to the Attorney General; and if he reports in favour of it, the king, as in the case of the Marquis of *Winchester*, grants the prayer of it. That is another ground for making him a party. The king sometimes, though not always,

(a) *Mif. Tr.* 151. n.

(b) 1 *Ves.* 202.

upon

upon the report of the Attorney General refers it to the House of Lords; the reference is not matter of benevolence; both the King and the House of Lords have a duty to perform; and although the House is not bound by the rules of evidence, we know it almost invariably adopts them. The case cited from *Bunbury* shows that the inferior courts will incidentally exercise a jurisdiction as to dignities: the Courts, in their ordinary proceedings, as in answers in Chancery and the different forms of process, may frequently be obliged to decide questions respecting them. A dignity might become the principal subject of contention, as in the case of two persons contending for the right to *Arundel Castle*, to the possession of which the title is annexed. The House of Lords does not possess the proper machinery for taking evidence; there are cases in which, by consent and for the convenience of parties, it has issued commissions for that purpose, but they are precedents which have not been followed.

1821.

 The Earl of
 BELFAST
 v.
 CHICHESTER.

Mr. *Wetherell*, in reply.

A claim to a peerage may be matter of right; but what evidence shall be received to establish it is matter of benevolence. The King and privy council for many purposes, as in colonial cases, act as a court of law, and are, therefore, bound to receive evidence like other courts. The difference between this case and that of the next of kin of a lunatic, has not been made out; if the Court assumes that the party will survive his ancestor, then in each case he will acquire an interest. The counsel for the Plaintiff, feeling the difficulty of treating the title to this dignity as an existing subject of contest, insist that the Plaintiff, as the eldest son of a peer, has other rights; but if a bill can-

1821.
 {
 The Earl of
 BELFAST
 v.
 CHICHESTER.

not be maintained as to the primary subject, it would be most extraordinary that it should hold as to rights which are collateral; and, besides, what is the use of this evidence with respect to rights which, when it is wanted, will be at an end.

The LORD CHANCELLOR.

To that argument there are two answers: 1st, that the bill states no such rights, and is not framed for the purpose of perpetuating evidence with respect to them; and, 2dly, that this Defendant is not the eldest son of a peer; and it is immaterial to him whether the Plaintiff exercises a hundred such rights.

The ATTORNEY GENERAL, in reply.

The Plaintiff's counsel have principally relied on the distinction between a dignity and land, the possessor of the former having no power of alienation; but does that give the issue in tail any interest? The issue of a tenant in tail of an estate granted for services could not file this bill. In the case of an executory devise the party has an interest which is both devisable and alienable. A dignity, it is true, cannot be alienated, but it may be forfeited; although an entailed dignity is not absolutely forfeited for felony (a), it is for treason. The argument arising out of the rights of the Plaintiff, as the eldest son of a peer, has been satisfactorily answered. The eldest son of an esquire, because he has a right to shoot game, could not file this bill. The objection to the Attorney General being made a party has not been removed; the references on petitions which are made to him and the House of Lords, and which it is clear from

(a) Earl *Ferrars'* case, vide 2 *Eden*. App. 573.

that very circumstance, has no original jurisdiction on the subject, are neither of them grounds for bringing him before the Court of Chancery.

1821.

The Earl of
BELFAST.

v.
CHICHESTER.

The LORD CHANCELLOR observed, in the course of the argument, that the prayer of the bill was, that the evidence might be used before the House of Lords, and asked whether it was necessary so to confine it? He likewise remarked, that he did not recollect any instance of a suit being instituted with respect to a title or dignity only, nor of any suit having a similar object with the present, unless the Plaintiff had a present interest. The entirety of the dignity was vested in another person, and the Plaintiff might never have any right to it; and it was difficult, with reference to the want of a power of alienation, to distinguish it from an estate tail, granted for services, or from what an estate tail became, immediately after the passing of the statute *de donis*. In one case, in which the question, how a title to a peerage could be made the subject of investigation in the lifetime of the existing peer, was much considered, the advice given was, that a stranger or the father should convey land to the eldest legitimate son in fee, either immediately or in remainder after his death. This plan would have removed the objection for want of a present interest, but it would still have remained a question whether the evidence could have been made use of in a struggle for the dignity. Perhaps if the bill had alleged that the Plaintiff was entitled to land, the reversion in which was in the crown, the Attorney General would be properly made a party. His Lordship also said, that the Chancellor was always consulted upon petitions claiming peerages, and that if he was satisfied with the claim, it was not referred to the House of Lords; it imposed a great responsibility on him, as, if he made a mistake, he made a peer.

1821.
 The Earl of
 BELFAST
 v.
 CHICHESTER.

At the close of the argument his Lordship delivered his opinion to the following effect : —

When the questions in the *Berkeley* case were put to the judges, the course of argument and conversation which took place, was of this sort. The points then in question were, whether the depositions which had been taken in the cause instituted to perpetuate testimony, could be received as evidence; or if they could not be looked at as depositions, whether they might not be received as declarations of the father, mother, and other relations, and so on. And it was further insisted, that if they could be let in as evidence, where the party had an interest in the suit, they could not be let in in a case where the crown was no party, and that the contest then was between the crown and the claimant. The question respecting the depositions was put to the judges, as relating to land, because if they could not be received as to land, *a fortiori*, they could not as to a dignity; and if the judges said they could as to land, it would be for the house to determine, reasoning by analogy, whether they could be received as to a dignity or not. You can carry this no farther than was done by Mr. *Stephen*, that no determination was given, because the necessity of coming to it was removed by the determination which the house came to upon the views of the judges as to land. The question whether this court has any jurisdiction to receive evidence, where the subject on the record is dignity and dignity only, was not entered into.

There have been many cases in Westminster Hall, in which the judges, finding it expedient to send them to the House of Lords to be determined without delay, have considered their judgment to be merely the means of giving them that species of transit. I have had occasion

occasion to state more than once, that it would be with considerable reluctance that I should so execute my duty, because, generally speaking, the suitors have a right to have the opinion of the judge, in order to know how to meet and combat it, if they think it beneficial that the case should go further. In no former case, however, could I have been so well justified in doing this, as in the present. Clothed with the character of a judge, and sitting in this place, it is not for me to give advice; but I will say, that nothing could be more fatal to the Plaintiff than to rest upon the notion, that any decision or opinion that may be given here, would be adopted by the House of Lords, if the case came before it. Another ground which justifies me in pursuing this course is, that the present case does not fall within the range of those principles which have given rise to the right of filing this bill. Whether those principles are right or wrong, after a series of decisions has established them, and in the case before the court, the distinction is nice and subtle, it is infinitely better that a case of that kind should be decided by the court of the last resort than here.

1821.
The Earl of
BELFAST
v.
CHICHESTER.

When I look to what has been decided as to the heir apparent and next of kin of a lunatic, and to what has been done upon a difference between one sort of expectancy and another, an expectancy accompanied with a present interest and one that is not, and consider how difficult it would have been to have made a distinction between the possession of a power of alienation, and the want of that power; when I look to what an estate tail was after the statute *de donis*, and what it became when the efficacy of that statute was destroyed by common recoveries; and when I look to those estates tail where the gift is for services, or the reversion is in the crown, and those in which it is not; and when I recollect that

1821.
The Earl of
BELFAST
v.
CHICHESTER.

a peerage is capable of alienation by forfeiture, and that although virtually granted in remainder, the person in remainder is never supposed to have any present interest; and again stating how nice the question is, I think that if this case did not press for a speedy decision, which it does, I should be justified in adopting this course. According to my present opinion, I must declare, though not without reluctance, and not forgetting that there would be hardship on the other side in making a contrary decision, that these demurrers must be allowed. I shall only add, that if the suggestion which I have thrown out of carrying this case to the House of Lords should be followed, it may be material to look a little to the form and prayer of this bill, and to consider whether the question which that house will have to determine, is put in as beneficial a manner for the Plaintiff as it might be. I may also add, that as the question very materially affects the jurisdiction of the House of Lords, sitting there I may hear arguments very different from those which can be addressed to me here; this furnishes another reason for sending the case there. I had rather not go into the grounds of my opinion, because I wish the case should go from me as little prejudiced as possible; but consistently with that opinion, I am bound to declare that these demurrers must hold.

Demurrers allowed.

1821.

BROMLEY'S CASE.

Feb. 12, 13, 14.

THE bankrupt having been committed by the commissioners for not answering to their satisfaction, had obtained on motion a writ of *habeas corpus*, and was brought up this day (*Monday*) at the sitting of the Court.

When a bankrupt, committed by the commissioners, is brought up by *habeas corpus*, notice must be given to the assignees; and notice on Saturday afternoon for Monday, unless his right to be discharged is perfectly clear, is not sufficient.

It is no objection to a warrant of commitment which recites several examinations, that it omits to mention that the bankrupt who had been committed was discharged at the conclusion of one of the examinations.

Mr. *Heald* appeared for the assignees, and objected that they had not been served with any notice till ten o'clock in the evening of the *Saturday* preceding.

Mr. *Rose* for the bankrupt contended, that notice was not necessary, the question depending under the statute (*a*), on the sufficiency of the warrant only. But if notice were required, the extent of it had not been fixed, and he argued that service on the *Saturday*, the order not having been obtained till the day before, was sufficient.

The LORD CHANCELLOR,

I apprehend that it is the constant course in the courts of law, when a person is brought up by *habeas corpus*, to hear the parties, who have a right to contend that the commitment was proper; and therefore there must be some notice, though I will not go so far as to say that there may not be cases where the right to the discharge may be so clear, that it may be done at once. If the assignees were not served till past ten on *Saturday*, that is good for nothing.

It afterwards appeared that the notice had been given on the *Saturday* at half past four; but the *Lord Chan-*

(a) 5 Geo. 2. c. 30. s. 16, 17, 18.

1821.
 }
 BROMLEY'S
 Case.

cellor thought it not sufficient, and directed the bankrupt to be brought up again on the following day.

The bankrupt had been examined for several days, from the 17th to the 22d of *December*, when, not answering to the satisfaction of the commissioners, he was committed. On the 8th of *January*, he was again brought up, and after being examined for some time, and being informed that the examination would be resumed on the following day, he was discharged: the examination was continued by adjournments, on the 9th, 10th and 11th of *January*, and on the 11th he was re-committed. The warrant stated all the questions and answers on the different examinations, and that he was committed till he should answer the questions so put to him as aforesaid. The fact that he had been discharged on the 8th of *January* was not noticed in the warrant, but appeared by affidavit.

Mr. *Rose* contended, that the omission of the circumstance of the discharge on the 8th of *January* was fatal. An affidavit may be received to prove it, as in *Coombe's* case (a), where the fact of a re-examination and re-commitment was supplied in the same way. The discharge proves, that up to the 8th, the answers were satisfactory; that is a material circumstance, which ought to have been recited in the warrant. Although that part of his examination was satisfactory, yet the commitment is till he shall answer all the questions.

Mr. *Heald* on the other side.

The general rule has been to look at the warrant only, and to receive affidavits of extrinsic matter, would

(a) 2 *Rose*, 396.

be breaking in upon it. According to a decision in the King's Bench in the course of last term, all the examinations must be set forth; the reason is, that as the questions refer to the previous examinations, the latter part cannot be understood alone; but it is of no consequence that some part of the answers taken alone was sufficient; and the fact of the discharge is not, therefore, material.

1821.
BROMLEY'S
Case.

The LORD CHANCELLOR.

The way in which I first looked at the objection was this; that there had been several examinations, (suppose, by way of illustration, three) at the end of which the bankrupt was committed, and that there were afterwards three more, and at the conclusion of these he was discharged. If that were so, I should take it as complete evidence, that up to that time he had answered satisfactorily. If there were afterwards three more examinations, and he was then committed by a warrant reciting only the three first and the three last, and omitting the intermediate examinations, and the discharge, then if the Court of King's Bench be right in the decision which they are said to have come to, I should think the omission a valid objection; for it is obvious that the other examinations, which must have had an effect on the minds of the commissioners, and ought to have a due effect on the mind of the judge before whom the bankrupt may be brought by *habeas corpus*, should be noticed. (a) But I now understand the fact to be, that all the examinations are set forth, and that it is the mere fact of the discharge, at the end of the sixth, that is not stated. I am of opinion that the non-statement of that fact is not at all material, because if the commissioners at the end of the sixth examination

(a) See *ex parte Vogel*, 2 Barn. & Ald. 219.

were

1821.

BROMLEY'S
Case.

were satisfied as far as they had gone, it was their duty to discharge him; but if, upon further examination into the same subject, they found reason to be dissatisfied with what they were before satisfied with, they had a right to commit him; and the fact being stated to the Court, it may take it to be clear that if the examination had stopped at the sixth, he ought to have been discharged.

The examinations being very long, were not discussed in court, but a copy of the warrant was handed up to the Lord Chancellor, who, after reading it, expressed, on a subsequent day, his opinion that the answers were not satisfactory, and the bankrupt was, consequently, remanded.

Rolls.
Feb. 14.

RITCHIE v. BROADBENT.

(Before the *Lord Chief Baron*, and *Masters Stephen and Jekyll*, for the *Master of the Rolls*.)

A married woman cannot by consent, on examination in court, part with her interest in a fund settled on her marriage for her separate use during her life, with a clause against anticipation, with remainder to the survivor of her and her husband.

ON the marriage of *Samuel Ritchie* and *Mary Broadbent*, a sum of 1900*l.*, 4 *per cent.* annuities, was transferred by the father of the latter, unto the names of trustees, and by an indenture of settlement of the 14th of *May*, 1810, the trusts were declared to be during the coverture to pay the dividends, as *Mary Broadbent*, notwithstanding her intended coverture, from time to time, by any writing or writings signed with her own hand, should direct or appoint; but not so as to deprive herself of the intended use or benefit thereof, by sale, mortgage, charge, or otherwise in the way of anticipation, and for want of appointment, into her hands, for her separate use, independently and exclusive of her husband; her receipts to be sufficient discharges; and after

Frank } 3786
Frank } 174

after her decease, in trust for her intended husband, if he should survive her; but if he should die in her lifetime, upon trust for her, her executors, administrators, and assigns.

1821.
RITCHIE
v.
BROADBENT.

Some time after the marriage, the trustees sold out the 1900*l.* stock, and lent the produce of the sale to *Ritchie* on his bond. The bill was filed by him and his wife against the trustees, stating that it would be more beneficial to their interests that the money produced by the sale should become the property of the husband, freed from the trusts of the settlement, and praying that it might be declared that he was so entitled to it, and that the trusts of the settlement were at an end, and that the settlement and bond might be cancelled.

Mr. *Raithby* for the Plaintiff, submitted that the consent of the wife might be taken. He mentioned a case of *Gullan v. Trimbe*y (a), before

(a) GULLAN v. TRIMBEY.

The testator gave to each of his two daughters, *Elizabeth* the wife of *John Paddon*, and *G. A. Gullan*, the sum of 1000*l.*, 3 per cent. consols, to be laid out by his trustees in the purchase of a well-secured annuity, for their lives respectively, and their several and respective receipts alone, from time to time, were to be sufficient discharges, independent of their present or any future husbands, and to be for their and each of their own separate use, benefit, and disposal.

The testator's estate not being sufficient to pay the whole of his legacies, 326*l.* was apportioned to *Elizabeth Paddon*, in respect of the 1000*l.* consols bequeathed to her as above. A petition was presented by her and her husband, praying that this sum might be paid to him, or that, if the Court thought it necessary that it should be invested in an annuity, then that the proper direction might be given for that purpose. On this petition, the consent of Mrs. *Paddon* being taken, the money was ordered to be paid to her husband.

Rolls.
Mar. 19. 1817.
Money bequeathed to be invested in an annuity for the life of a married woman, for her separate use, paid to the husband upon her consent taken in court.

Reg. Lib. A. 1816. fo. 697.

Sir

1821.

RITCHIE
v.

BROADBENT.

Sir *William Grant*, subsequent to *Richards v. Chambers. (a)*

The LORD CHIEF BARON.

The Court cannot interfere. It was the express intention of the parties that the fund should be secured for the wife's benefit for her life. To make this decree, would be *anticipating* it. I am not sure that I should have followed the example of the Master of the Rolls in the case cited.

The bill must be dismissed.

Mr. *Maddock*, for the Defendants.

(a) 10 *Ves.* 584. See *Sturgis v. Corp.*, 15 *Ves.* 190. *Pickard v. Roberts*, 3 *Mad.* 584., and *Howard v. Damiani, infra.*

ROLLS.

Jan. 29. 1817.

A fund in which a married woman has a reversionary interest, transferred to a purchaser, on her consent taken in court.

HOWARD v. DAMIANI.

S. Flory by his will gave the residue of his personal estate to trustees, upon trust, to pay the rents and profits, but no part of the principal, to his sister, the Plaintiff, for her life; and after her death he gave it to his two nephews. One of the nephews, by a will made after the testator's death, gave his share of the testator's estate, and his other personal property, to the Plaintiff for life, and on her death to such persons as she should by writing, attested by three witnesses, appoint; by a codicil he gave 5000*l.* to *Elizabeth*, afterwards the wife of *F. Damiani*, to be paid to her after the death of the Plaintiff, out of his share of the testator's estate. Since his death 200*l.* had been advanced by the trustees to *Elizabeth Damiani*, in part of her reversionary legacy of 5000*l.*; and the Plaintiff agreed with *F. Damiani* to purchase the remaining 4800*l.* for 2700*l.*

The bill was filed against *F. Damiani*, and *Elizabeth* his wife and the trustees, for the purpose of obtaining payment of the sum of 4800*l.* to the Plaintiff. The cause was heard by consent before Sir *W. Grant*.

Mr. *Shadwell* for the Plaintiffs.

Mr. *Merivale* for the Defendants.

The *Master of the Rolls* (Sir *W. Grant*) made the following decree. "Whereupon, &c., and the Defendant *Elizabeth Damiani*, the wife of the Defendant *F. Damiani*, being present in court and examined, and consenting and desiring that the agreement in the pleadings mentioned should be carried into execution, His Honour doth order and decree, that the Defendants *T. A. H.* and *H. H.* be at liberty, on payment by the Plaintiff of the sum of 2700*l.* to the Defendant *F. Damiani*, to pay the sum of 4800*l.* to the Plaintiff."

Reg. Lib. A. 1816. fo. 909.

1821.

RATCHIE
v.
BROADBENT.

BROMHEAD v. HUNT.

ROLLS.
Feb. 15. 19.

(Before the Lord Chief Baron and Masters *Alexander* and *Dowdeswell*.)

JAMES HUNT, by his will, gave the residue of his estate and effects to his executors upon trust, to convert it into money, and invest the produce in the funds, and to stand possessed of it, in trust for all his children living at his decease, or born in due time afterwards, equally to be divided amongst them; the shares of sons to be transferred and paid at 21, and the shares of the daughters to continue vested in the names of his executors, for their benefit, upon the trusts therein declared. The will then contained directions as to the maintenance of the children during their minorities, and a clause of survivorship in the event of any of the sons dying under 21, or the daughters before marriage. It was then provided that the shares of the daughters were to continue in the names of the executors, upon trust, to permit

Gift of personal property to trustees, to be settled on the marriages of the testator's daughters for their separate use, and on their deaths upon trust for their children, with a limitation over in the event of either of the daughters dying without having been married, or without leaving any children her surviving.

The shares of the children of each daughter are vested, subject to be divested by all dying before their mother; and there being one alive at her death, the representative of two who died before her, held entitled to their shares.

them,

1821.
 BROMHEAD
 v.
 HUNT.

them, on attaining 21, to receive the interest, during their lives, or till they should marry, and to transfer and pay to them one third of the principal of their respective shares, on the day of their respective marriages; and to assign, settle, and assure the remaining two third parts, in the names of themselves, or other trustees, upon trust to pay and apply the interest and dividends, for the separate use of his daughters for their lives; and after the decease of his daughters, "upon trust, as to the principal and the stocks, funds, and securities, in which the same shall be then invested, in trust for, and for the benefit of all and every the children of my said daughters, in equal parts, shares, and proportions; and in case either of my said daughters shall happen to die without having been married, or if married, shall not happen to leave any children her surviving, then upon trust, to assign, transfer, and pay the said trust funds, and securities, unto her surviving brothers and sisters, and the children of any deceased brother or sister, in equal shares and proportions, such children taking only such share as their parent would have been entitled to if living."

The testator died in 1799, leaving a widow and five children surviving him. One of his daughters, *Margaret*, having attained 21, married *J. Empson*, and died, leaving one infant son, *W. J. Empson*; she had issue two other children, who died in her lifetime, and to whom their father took out administration. Two-thirds of her share of the testator's estate had been transferred into the name of the Accountant-General; and a petition was now presented in the name of the infant, *W. J. Empson*; claiming the whole of this fund as the only surviving child at his mother's death. The father, *J. Empson*, also petitioned, claiming to be entitled to two-thirds of it, as representative of his deceased children.

Mr.

Mr. *Horne*, Mr. *Rolfe*, and Mr. *Tinney*, in support of the petition of the infant.

1821.
BROMHEAD
v.
HUNT.

The testator contemplated a settlement of two-thirds of his daughters' shares to be made so as to exclude the husbands. At the death of the daughters the fund was to be divided amongst their children, which can only include those in existence at that time. During the life of the daughters the interest only is given; the principal is the subject of a distinct bequest to take effect at the daughters' death, which suspends the vesting. *Billingsley v. Wills* (a), *Brograve v. Winder* (b), *Batsford v. Kebbell* (c), *Hoghton v. Whitgreave*. (d) The gift at the daughter's death is of the securities in which the fund shall be *then* invested, an expression confining the gift to that period. From the limitation over, in the event of all the children dying before the mother, it is apparent that survivorship amongst them was intended; if all died, none of the representatives would take; but if some survived, the representatives of those who died would be entitled; and the right of the representatives of those who died would depend on the circumstance of one surviving the mother. This could not have been the intention.

Mr. *Agar* and Mr. *Empson*, on the other side.

The distinction between a gift of the principal and a gift of the interest is not applicable here, as the whole fund is given at once to the trustees, and separated from the testator's general estate. The gift to the children after the death of the mother would vest in them according to *Monkhouse v. Holme* (e), and many other cases; and the limitations over only divesting it in an

(a) 3 Atk. 219.

(b) 2 Ves. jun. 654.

(c) 5 Ves. 565.

(d) 1 Jac. & Walk. 146.

(e) 1 Bro. C. C. 298.

1821.
 BROMHEAD
 v.
 HUNT.

event that has not happened, cannot be extended by implication to create a survivorship in other events that are not provided for: *Randall v. Metcalfe* (a), *Skey v. Barnes*. (b) They also referred to *Exel v. Wallace* (c), *Weedon v. Fell* (d), *Taylor v. Longford* (e), *Browne v. Lord Kenyon*. (f)

The LORD CHIEF BARON.

In this case there are two petitions; one by the surviving child of Mrs. *Empson*, claiming to be entitled to the whole of a fund that was settled on his mother for her life; the other by the father as administrator of two children who died before the mother, insisting that they took vested interests. The question arises on the will of *J. Hunt*, by which he gives all the residue of his property to trustees; there is no division in the bequest of interest from capital; the whole is given to the trustees out and out; they are to apply the interest in the manner directed, and, in certain events, to transfer the capital. The object of the first direction given is, that it may be so settled as to secure the receipt of the interest for the daughters during their lives; and after the decease of the daughters it is given in trust for all and every their child and children. If it rested here, there could be no doubt that each of the children took absolute vested interests.

There is then a gift over in case either of the daughters should happen to die without having been married, or without children surviving her; and upon this part of the will the question arises whether the effect of the former words, which seem quite clear as to vesting, is destroyed by it. There is no limitation over in the

(a) Cited 9 *Ves.* 314. (b) 3 *Mer.* 335. (c) 2 *Ves. sen.* 118.
 (d) 2 *Atk.* 123. (e) 3 *Ves.* 119. (f) 3 *Mad.* 410.

event of some of the children dying in the lifetime of their mother; and if it is to be supplied, it can only be by some inference. The daughter having left a child, that is sufficient to satisfy the words; the gift over therefore does not take effect; then is there any thing to give it to those only who survive? Such a construction would, no doubt, be very inconvenient; for if the children of the daughters married, and had issue, and then died in the lifetime of their mother, could we take away all benefit from the issue, by an inference drawn from words that do not look towards survivorship. The daughter has married and has left a child; in that event there is no limitation over expressed; but there is an express gift to the children absolutely; how then can that be divested?

1821.
BROMHEAD
v.
HUNT.

If there had been no authority, I should have thought, and my learned friends agree in opinion with me, that this must clearly be the construction; but there are authorities in point. In *Skey v. Barnes* (a) the testator gave personal property after the death of his daughter to be divided amongst her children, and the issue of a deceased child: the portions of the sons to be paid at 21, and those of the daughters at 21, or marriage, with a gift over in the event of there being no issue, or of their all dying before their portions became payable. Sir *W. Grant* considered it, as he did every case, in a most clear and satisfactory mode, and held the shares to be vested in the children, and transmissible to their representatives. That is certainly a stronger case than this. There is another case, *Stargess v. Pearson* (b), where there was a gift of personal property to be divided amongst three children, or such of them as should be living at the death of their mother. They all died before her, and the Vice-Chancellor was of opinion that the

(a) 3 Mer. 535.

(b) 4 Mad. 411.

1821.
 BROMHEAD
 v.
 HUNT.

will gave them vested interests, to be divested only in the event of there being some or one of them living at the mother's death, and that not having happened, their shares passed to their representatives. These two cases are direct authorities for the principle on which we proceed. We are of opinion that the shares of the children who have died were vested, and that their father is entitled to them.

This Court doth declare that, according to the true construction of the will of the testator, *J. H.*, in the pleadings named, the children of *Margaret Empson* deceased, late *Margaret Hunt*, took each of them a vested interest in the share of the said testator's residuary estate, to which the said *M. E.*, their mother, became entitled for her life, under her said father's will.

Reg. Lib. A. 1820. fo. 998.

Lloyd v. Wait/Phillips 62
 SHORT v. LEE.

ROLLS.

Feb. 21, 22.

25, 26, 27.

Mar. 1. 3.

A book in the hand-writing of *A. B.*, pur-

porting to contain account of tithes collected by him seventy years ago, cannot be received in evidence, without proof that *A. B.* was collector of tithes at that time.

In a suit for tithes by the lessee of an ecclesiastical corporation aggregate, to whom the rectory belonged, ancient documents in their possession, purporting to be accounts furnished by some of their members employed to collect the tithes, and appearing to be approved and settled, are admissible in evidence.

The statutes of the body enjoining the appointment of collectors, together with the internal evidence of the documents, and their coming out of the proper custody, held sufficient proof that the accounting parties were really collectors.

Modus of 4d. for every milch cow and calf, and 3d. for every heifer and calf, in lieu of tithe of calves and milk, bad.

Modus of 3d. for every hogshead of cyder, and 1d. for fruit, in lieu of tithe of apples, pears, and other fruit, bad.

It is the duty of a court of equity to decree tithes in kind, when satisfied that the modus set up is either bad in law, or that it has not immemorially existed.

An issue is not to be directed, unless there be reasonable doubt as to the fact, and when it depends on evidence, the effect of which can be better ascertained by a jury.

for the tithes of hay, clover, and other artificial grasses, calves, milk, colts, agistment, apples, pears, and other garden-stuff. The plaintiff was lessee of the Custos and College of Vicars Choral of the cathedral church of *St. Peter* in *Exeter*, who, as impropriate rectors, were entitled to both the great and small tithes.

1821.

SHORT
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The Defendants, by their answer, set up the following moduses: "for every acre of meadow hay, cut, mown, or taken upon or from off the said lands and farms, yearly at *Easter* the sum of 4*d.*; and for every acre of pasture hay, cut, mown, or taken upon or from off the said farms and lands, yearly at *Easter* the sum of 3*d.* in lieu of the tithe of hay, clover, and other artificial grasses; and also for every milch cow and calf kept and fed within the said parish, yearly at *Easter* the sum of 4*d.*; and for every heifer and calf kept and fed within the said parish yearly at *Easter*, the sum of 3*d.* in lieu of tithe of calves and milk; and for every foal and colt yielded and brought forth within the said parish, yearly at *Easter* the sum of 1*d.* in lieu of the tithes of foals or colts; and also for every barren vere and unprofitable cow, kept, fed, agisted, or depastured within the said parish, yearly at *Easter* the sum of 2*d.* in lieu of the tithe of agistment of barren and unprofitable cows; and also for every hogshead of cyder produced and made within the said parish, yearly at *Easter* the sum of 3*d.*; and for fruit, including hoard apples, when gathered within the said parish, yearly at *Easter* the sum of 1*d.* in lieu of tithes of apples, pears, and other fruit; and also for every garden, and herbs growing therein within the said parish, yearly at *Easter*, the sum of 1*d.* in lieu of tithe of garden stuff."

1821.

SHORT
v.
LEE.

On the part of the Defendants, the depositions of several witnesses in support of the moduses were read, and also the ecclesiastical survey, in which the tithes of corn were stated to belong to the rectory; those of hay, calves, and some other articles, were not expressly mentioned; there was, however, this entry, "*in aliis decimis contentis in libro Paschali, 8l. 8s.*" They also tendered, amongst other evidence, a book purporting to have been the account-book of a former tithe collector in the years 1752, 1753, and 1754. A witness stated that this book appeared to be in the hand-writing of one *Robert Beale*, with whose hand-writing he was well acquainted; and he and other witnesses had been informed that *R. Beale* was the tithe collector of *T. Heathfield*, who was proved to have paid rent to the college, and was therefore supposed to have been at that time the lessee of the rectory; the book came from the possession of *J. Beale*, the son of *Robert Beale*.

Mr. Horne and *Mr. Boteler* for the Plaintiff, objected to the reception of this book, on the ground that there was not sufficient proof of its being in the hand-writing of *R. Beale*, or of his having been actually the collector.

Mr. Wetherell, *Mr. Heald*, *Mr. Merivale*, and *Mr. Wakefield*, for the Defendants.

From the distance of time, it would be next to impossible to prove the appointment of *Beale* to be collector; but if information and belief, proving that he was reputed to hold the office be not sufficient, the book itself is evidence that he acted as such, and in several cases collected by *Mr. Phillips (a)*, proof of exercising an office was held to be sufficient evidence of possessing

(a) *Treat. on Evidence*, 180., 3d edition.

it. Internal evidence is in all cases to be had recourse to, for the purpose of ascertaining whether a book produced is or is not a receiver's book (a); and such books have been admitted in evidence, even though the hand-writing could not be proved. (b) An entry by a midwife of the birth of a child, referring to his ledger, is evidence of the child's age. (c)

1821.

SHORT
v.
LEE.

The MASTER of the ROLLS.

It would have been more satisfactory if the witness had proved that he had seen *Beale* write, but I think there is reasonable proof that the book is in his hand-writing. Still it appears to me that there is not enough to warrant the Court in receiving it as evidence. The foundation for the admissibility of this species of evidence is to be had by ascertaining clearly the character filled by the writer. Though the cases have gone a great way in favour of rectors, in making the books and papers of their predecessors evidence for them, yet in all these cases, the first point is to prove the character of the individual who wrote them; if you fail in this, they cannot be evidence. If the writings of persons not invested with the proper characters were received, nothing could be more dangerous to property. Suppose that *Beale* was not the person authorized to collect the tithes, but nevertheless had for some purpose made these entries; then if after his death the book, purporting to be a collector's book, was to be evidence to prove that he was collector, and his being collector was to prove the entries to be correct, the consequence would be, that the rights of the rector on the one hand, or those of the parishioners on the

(a) *Doe d. Webber v. Thynne*, 10 East 206.

(b) *Jones v. Waller*, *Grill*. 847.

(c) *Higham v. Ridgway*, 10 East, 109.

1821.

SHORT
v.
LEE.

other, would be exposed to the greatest danger, and perhaps from the writing of a person having a contrary interest. In *Jones v. Waller*, I suppose they must have found by some evidence that the book was written by a collector; when you fix him with that character, his entries become evidence, and the principle is the same with stewards' books, and in the case of the midwife's memorandum.

The character of a tithe collector is a private one; it may or may not exist, for the lessee may collect either by himself, or through the medium of an agent. It is not like those public offices which have been alluded to, which must exist, and with respect to which you may therefore presume that a person who acts in them has been appointed. Here, on the contrary, you have first to raise the character into existence, and then to prove that this person filled it. Supposing that *Heathfield* was the lessee, which is not proved, for though he paid rent to the college, it does not appear for what, yet still *non constat* that there was any collector. In all the private relations of life, you do not presume the existence of the particular character, nor does a person's acting in that character prove that he possessed it. Cases have been cited of acting in a public character having been held evidence against the party of his holding that character, and sometimes against third persons, but there is no instance where that has been extended to private situations. How extremely mischievous it might be in commerce. It would let in a very dangerous latitude if the Court were once to dispense with that which is an essential preliminary before any writing, not verified on oath, can be made evidence, and which must be established by proof *aliunde*.

On the part of the Plaintiff some ancient parchment rolls were produced, purporting to be accounts of the collection of the tithes of *Woodbury*, by proctors appointed by the college for 36 different years, between the years 1401 and 1495; the reception of these documents was objected to.

1821.

SHORT
&
LEE.

It appeared that the rectory of *Woodbury* was granted to the custos and college of vicars choral by *Henry Marshall*, Bishop of *Exeter*, some time between the years 1191 and 1203, and by the grant it was directed that the vicars should annually choose a proctor to collect the tithes. The grant was confirmed by the succeeding Bishop of *Exeter*, *W. Brewer*, in the year 1228, and afterwards by letters patent of the 6th *Henry IV.* A. D. 1405, by which the college was incorporated: and a book was produced from the muniment room of the college, purporting to be a copy of certain statutes made about the same period for their government, by which, amongst other things, it was provided that yearly, on the feast of *St. Gregory*, two proctors should be chosen to receive and dispose of the tithes of *Woodbury*. The college consisted of a custos and 24 vicars, all of whom were formerly ecclesiastical persons. The rolls in question were found in their muniment-room, and purported to be the accounts of the proctors. They were, with some slight variations, in the following form: *Wodebury. Compotus dominorum R. C. et T. C. procurator' idm a festo Pasch' anno & p annu integm'.* Then followed the different receipts for the year, introduced by the words, *Imprimis respondent de, &c.*; the expences were next stated, and they concluded thus: *Et sic debent de claro lxvs. 11d. ob — quos solant et sic quieti recesserūt.* With respect to some of the items, they occasionally referred to other documents, as thus: *ut patet per rentale; ut patet per papirum inde fact; ut*

1821.

SHORT
v.
LEE.

plenius patet in quadam cedula huic compoto annexa et corā auditoribus cōputata. It was stated that the final words, *sic quieti recesserunt*, or *sic quietus recessit*, importing a discharge to the proctors, were, nearly in all instances, written in a different character or ink, or both, from the body of the account. It appeared by a comparison of the names, that the proctors for the years to which these accounts applied, were themselves vicars of the college.

It was argued for the Defendants, that the principle on which the accounts of stewards and bailiffs are received could not be extended to these rolls, the collectors not being mere agents, but being themselves interested as members of the college, and having, therefore, an interest in augmenting its revenues. The steward's books are received, on the ground that his only interest is to diminish the amount. And the Court cannot enter into a comparison of the proctor's interests in his two characters of vicar and receiver; for however small the interest of a corporator may be, it is sufficient to disqualify him. *Burton v. Hinde (a)*. The reception of these documents would be open to all the objections of letting in evidence made by the parties for themselves. They appear to have been prepared by the proctors of the year, and the body at large together, and cannot therefore be distinguished from any other corporation-books, which are not evidence against strangers in questions of private right. *Brown v. Corporation of London (b)*, *Cook v. Baker (c)*, *Mayor of London v. Mayor of Lynn (d)*, *Marriage v. Lawrence. (e)*

Nor does the practice which has prevailed with respect to rectors' and vicars' books meet the present case;

(a) 1 T. R. 174.

(b) 11 Mod. 225.

(c) 3 Keb. 12.

(d) 1 H. B. 207.

(e) 3 Barn. & Ald. 142.

those

1821.

SHORT
v.
LEE.

those books are received "because," as Lord *Hardwicke* said, "the parson knows that his entry cannot benefit either himself or his representative, who has nothing to do with the living; and it is not to be presumed that the parson would make false entries for his successor, who stands indifferent to him." It was on the same principle that in *Illingworth v. Leigh* (a) the books of the lessee were admitted, his interest being only temporary; and as he could not have benefited himself by any fabricated entries; so in *Perigal v. Nicholson*. (b) The principle fails of application to the case of entries made by those who have a permanent interest, the inheritance being vested in them. It is indeed said in Mr. *Phillips's* work (c) that the books of improper rectorors have been received, but the cases referred to do not bear out the assertion. *Illingworth v. Leigh* was the case of a lessee. In *Woodnoth v. Lord Cobham* (d) the accounts produced were those of the impropriator's steward, and were therefore evidence, on the general principle, applicable to stewards' books. The anonymous case in *Bunbury* (e), and that in *Viner* (f), appear to have arisen in the course of the same suit, heard first in the Exchequer, and afterwards tried in an issue before King C. J.; and from the report in *Bunbury*, it seems probable that there also the books were not those of the impropriator himself, but of his steward. Here the accounts are prepared by a member of the corporation, and agreed to by the body at large, in whom the whole inheritance is vested. It appears also from the references to other documents that these accounts were only copies. They conclude with a discharge to the proctors of the year; and were probably settled at a meeting of the body; they are not, therefore, to be compared to private

(a) 4 *Gwill.* 1618.

(b) *Wightw.* 65.

(c) P. 200., 3d ed.

(d) 2 *Gwill.* 653. *Bunb.* 180.

(e) P. 46.

(f) *Evidence*, T. b. 73.

account-

1821.

SHORT
v.
LEE.

account-books. If they are to be considered as receipts to the proctors, the proper custody for them to have come from would have been that of the hands of the descendants of those persons. Another objection is, that there is no proof, except from the rolls themselves, that the persons named ever were appointed proctors.

On the part of the Plaintiff it was contended, that the practice of receiving the books of vicars and rectors in evidence in favour of their successors, did not depend on their having no interest to make false entries, but was an exception to the general rules of evidence. It was so treated by Lord *Kenyon* in *Outram v. Morewood* (a); it is an anomaly in the law, and not connected with the principle on which collectors' books are admitted. Whatever the reason of the exception may be, it must extend to these rolls, as well as to the ordinary case of a vicar's book. Even if it turned on the amount of interest, the result would be the same, for these vicars have no interest beyond their own lives. In *Bullem v. Michell* (b) the accounts of the reeve of an abbey, allowed by the bailiff, were received, to prove the payment of tithes in kind; and in *Morgan v. Tyler*, in the Exchequer, a few years ago, which was a bill for tithes in the parish of *Hornchurch*, in *Essex*, some rolls were produced containing the accounts kept by the bailiffs of *New College Oxford*, the impropriate rectors, between the years 1389 and 1480; they were received in evidence. In a late case in the Exchequer, *Finch v. Messing*, the bill was filed by the vicar, and he produced in evidence an account given in by a sequestrator to the Bishop in the year 1600; it contained, like those documents, a charge and discharge, but the Court was of opinion that it was evidence. Lord *Ellenborough*, on

(a) 5 T. R. 123.

(b) 2 Price, 399. See p. 413.

1821.

SHORT
v.
LEE.

the trial of an action which turned upon the title of the Dean and Chapter of *Westminster* to a part of *Tothill Fields*, received in evidence some ancient accounts rendered to them of their rents; there was the same objection as in this case, arising from the circumstance that the persons entrusted with the collection appeared to be themselves members of the body, but it did not prevail. In the same way old leases and rent rolls have been admitted, though in favour of a party claiming under the lessor. (a)

The MASTER of the ROLLS.

This question is one that has very properly given rise to a considerable extent of argument, considering its importance, and the degree of novelty attempted to be given to it. I shall state my view of it now, but am desirous that the counsel should not consider themselves precluded from suggesting any further observations on it in the progress of the cause.

It is material in questions of evidence to bear in mind what is the point in issue: here we have a question relating to spiritual possessions; and, therefore, arguments deduced from the rules of evidence as to other property do not apply, as it depends upon the law which governs the evidence as to tithes, the subject matter of this suit. It is attempted, on the part of the Defendants, to make out an immemorial usage of a fixed payment for tithes, against the common law right of the rector; and direct and positive evidence for a considerable period, and evidence of reputation, which in these cases is properly received, for a longer period has been given, shewing that this fixed payment has existed as far back as we can go, from which it is to be presumed, that it

(a) *Phillips, Ev.* 202., 3d edition.

has

1821.

SHORT

v.

LEE.

of the day, when there was no dispute, and when the accounting party had no interest to charge himself with what he had not received, the principle on which entries by stewards are held to be evidence applies.

Another objection is, that the proctors were members of the body; that fact is not disputed, as it is to be fairly collected from these documents, that in most instances, if not in all, it was the case. But what difference does that make. The profits were to be distributed equally; the collector, therefore, as a member of the body, had an interest to the extent of a twenty-fourth part of the actual receipt; but on the other side, his interest extended to the entire amount. Could he then be suspected of wrongfully setting down, from interested motives, what he had not received, in order that he might, by charging himself with 24*l.* recover 1*l.* back again. He had an interest directly against every entry. In cases of this kind the question must be, whether circumstances are not presented, excluding the probability of its being a false representation of the *res gesta* at the time. If the entries are made by one on whom there was nothing operating to make him falsely charge himself, the difficulty of getting evidence after a great lapse of time has induced the courts to receive them. That applies to these entries, even if the proctor was a member of the body; but if in any of the instances he was not, they then fall within the common case of stewards' books.

There is another ground for receiving these rolls. Suppose them to be the accounts of the corporation, and not of the individual collector; then the question arises, whether, with respect to entries relating to tithes, an ecclesiastical corporation aggregate is distinguishable from a corporation sole; and if entries made by the latter

latter are received as evidence as to tithes, is there any principle on which it can make a distinction, whether the corporation consists of one or of many? Both are ecclesiastics, both owners of tithes, and both have temporary interests only. How can they be distinguished.

1821.

SHORT
v.
LEE.

Thus there are two principles, independent of the authorities, in favour of the evidence; first, that they should be received as the entries of the proctors, and though they were members of the body, that does not affect the ground on which such entries are admitted; there being evidently a balance of interests, and the interest in making the entry being the smallest. The case before Lord *Ellenborough*, loose and imperfect as the note of it is, is directly in point to prove, that the circumstance of the entries being made by one of the members of the body makes no difference; though upon a question of disputed title and not of tithes. (a) It is never inquired whether the steward had any interest in the amount, either by receiving a poundage or in any other way. As the proctor acted individually and not in his corporate character, his being a member of the body is of no consequence; no case has been found where it was so considered: and if we look to the set off of the opposite interests, the preponderance being against making false charges, reduces him to the situation of any other proctor or collector.

Now consider it the other way, as the account made out by the corporation. It is admitted that the entries

(a) On a subsequent day, His Honour mentioned that he had made enquiries respecting that case, and found that it appeared by the documents then produced, that the persons rendering the accounts were members of the Abbey, from the circumstance of their being mentioned sometimes as *frater* and sometimes as *monachus*.

of

1821.

SHORT
v.
LEE.

As to the principle on which entries in a rector's books are admitted as evidence for his successors. *Qu.*

Entries of tithes received, in the books of an ecclesiastical corporation aggregate entitled to a rectory, are evidence for their successors.

Whether entries in the books of a lay impropriator in fee, of tithes received, are

of a rector or vicar are evidence for or against his successors. It is too late to argue upon that rule, or upon what gave rise to it, whether it was the *cursum scaccarii*, the protection extended to the clergy, or the peculiar nature of property in tithes. It is now the settled law of the land. It is not to be presumed, that a person having a temporary interest only, will insert a falsehood in his book, from which he can derive no advantage. Lord *Kenyon* has said, that the rule is an exception; and it is so, for no other proprietor can make evidence for those who claim under him, or for those who claim in the same right, and stand in the same predicament. But it has been the settled law as to tithes, as far back as our research can reach. We must, therefore, set out from this as a datum; and we must not make comparisons between this and other corporations. No corporation sole, except a rector or vicar, can make evidence for his successor. It is, therefore, of no consequence what the law may be as to other corporation books that do not relate to tithes. The question is reduced to this, whether when tithes are the subject matter of dispute, there is any difference between a corporation of one and of many, no authority having been cited where such a distinction has been taken, or even where the case of a lay impropriator has been distinguished.

It is said, that a vicar in general may be trusted, because he has no inducement to fabricate; that argument applies equally to those vicars who have only life interests. On what principle can it be said, that he shall be trusted when alone, but not when he is one of many? With respect to the case of a lay impropriator in fee, it is not the question here; he certainly may be suspected, as he has a permanent interest, and might be making evidence for his heirs. But in this case and that

that of a vicar it is different: for though in both of these cases the corporation continues, yet it is composed of unconnected individuals; the man who dies transmits no interest to his representatives. It is to be observed that all the cases are the same way: in all of them the evidence was received. It is doubted, whether in the anonymous case in *Bunbury* and *Viner*, the books were those of the impropiator himself or of his collector; but it certainly purports to have been his own book, for it is put upon the same principle as a vicar's books. But if it had been the book of a steward, or of any third person, it would have been received upon the general law; and Lord Chief Justice *King* would not have spoken of the *cursus scaccarii*, which would then have had nothing to do with it. It seems, therefore, to have been decided in the Exchequer, and at *Nisi Prius*, that the books of a lay impropiator were to be received in the same way as those of a vicar or rector. It is not new to treat the lay and ecclesiastical rector in the same way; we know that, notwithstanding the many ingenious arguments against it, the lay rector has the same privileges as the ecclesiastical with respect to prescription *in non decimando*.

1821.

SHORT

v.

LEE.

evidence for
those claiming
under him.
Q^a.

In *Illingworth v. Leigh* the entries were made by the lessee of the impropriate rector; they were not received upon the principles of the general law of evidence, for unquestionably entries made by a lessee could not be received in general; he could not make evidence for his landlord. The reason why they were received was, that it was on the subject of tithes; the decision could not be referred to any other principles: on any other subject they could not have been read. That was the case of an impropiator in fee, who was put, in this respect, on the same footing as a vicar. In other cases in *Gwillim*, the subject was much discussed, and the doc-

1821.

SHORT

S.

LXX.

trine generally admitted. In the *Hornchurch* case it was much argued; but there the accounts were kept by a bailiff resident on the farm, and therefore would have been evidence, even if it had not been a question relating to tithes.

The case of *Bullen v. Michell* bears upon this, as being a case of mutual accounts examined on both sides. In another case, *Manby v. Curtis (a)*, C. B. Thomson, speaking of a collector's receipt, says: "If this sum was actually received, the person who has given this receipt was the collector, and even supposing him to be dead, they might have produced his account with his principal, and legitimately shewn that he had charged himself with the receipt of this sum; and, upon that ground, it would have been evidence." These rolls are of that description; they are accounts with the principals.

I think then that, supposing these rolls to be the accounts of the body itself, composed of persons having only a temporary interest, they are admissible in evidence on the same principle as a vicar's books. On the other ground, which is quite distinct, and which would apply even if this were not a question as to tithes, namely, that they are the accounts of a collector charging himself, I also think they ought to be received.

The rolls being read, a minute discussion of their contents ensued, the Defendant's counsel endeavouring to reconcile them with the moduses. (b) They referred to

(a) 1 Price, 329.

(b) The word *albedo*, which occurred in most of the Rolls, occasioned some difficulty. There were entries of sums received under the

to *Heathfield v. Trosse* (a) and *Trewin v. Bond* (b), cases relating to the parish of *Woodbury*, in which the moduses in question were admitted; and they pressed for an issue, as the usual mode of deciding questions of modus and other questions of fact, citing *O'Connor v. Cook* (c), *Morris v. Warden and Canons of St. Paul's* (d), *Ex parte Wilson* (e), *Ex parte Gallimore* (f), *Hampson v. Hampson* (g), and *Drake v. Smith* (h). As one ground for directing an issue, it was urged that, by tendering a bill of exceptions, the question of the admissibility of the rolls in evidence might be put upon the record; in answer to which *Bullen v. Michell* (i) was cited, where the majority of the Court of Exchequer held that a bill of exceptions was not regular in an issue out of a court of equity.

1821.

 SMOKE
 v.
 LAW.

On the question of evidence, in addition to the arguments previously offered, it was contended that, by comparing the opposite interests of the individual vicar who was collector, it appeared that the balance was in favour of augmenting the revenue. His interest as proctor was only for one year; whereas he enjoyed for life a 24th share of the revenue, when the number of vicars was full, and more when there were vacancies, which was often the case, or when any were non-resident, they being then excluded. By *Tanner's Notitiæ* it appeared that in the 26th of *Hen. 8*, there were only 20 members;

the head of *verditio albedinis*; and of sums paid to women *pro collectione et deliberatione albedinis per annum*. From the context, and from its appearing to be frequently substituted for *lactitium*, it was supposed to be synonymous with that word.

(a) 8 *Wood*. 245.

(b) 1 *Wood*. 598.

(c) 6 *Ves*. 668.

(d) 9 *Ves*. 165.

(e) 1 *Atk*. 152.

(f) 1 *Mad*. 67.

(g) 3 *V. & B*. 41.

(h) 1 *Daniell*, 104. 5 *Price*, 369.

(i) 2 *Price*, 416.

1821.

SHORT

v.

LEE.

and in the rolls for the year 1430, it was stated that only 18 shared. The interest, therefore, which they had as corporators, must have been greater than the opposite interest in the character of proctors.

The MASTER of the ROLLS.

The Plaintiff having proved his title as rector, the onus of proving that it is not to be followed by the usual legal consequences lies on the Defendants. For this purpose it is not enough to establish a customary payment subsisting for a long period of time; that is not disputed. The point on which they are at issue is, whether the rector is bound for ever by this money composition; which depends not upon its actual payment, but upon its antiquity. There is no deed prior to the 13th of *Eliz.*, nor any evidence of such a deed; it is, therefore, necessary for the Defendants to prove the usage to be immemorial to raise the presumption of an agreement between the proper parties, the patron, the parson, and the ordinary. If they fail in proving this, the rector is not bound. I just notice here a very extraordinary case that one is surprised to find in the books; it is that of *Sansom v. Shaw*, stated in 2 *Gwill.* 806. from a MS. note of Mr. Justice *Buller*, where a learned Serjeant is represented to have gravely contended that, with respect to modus, the time of legal memory did not mean the time of *Rich.* 1.; and he seems to have received some encouragement from the Court. There must be something incorrect in the report; it certainly is not law.

Now in this case the Defendants allege several customary payments. The first is, for every acre of meadow hay, yearly at *Easter*, 4*d.*, and for every acre of pasture hay, yearly at *Easter*, 3*d.*, in lieu of the tithes of

1821.

SHORT
v.
LEE.

of hay, clover, and other artificial grasses. I do not recollect any instances of this sort of double modus for hay, dividing it into kinds, and paying 4*d.* for one, and 3*d.* for the other; and the witnesses are not quite consistent upon it; the term pasture hay, I observe, is dropped in their evidence; they say that 4*d.* was paid for meadow hay, and 3*d.* for other hay, and one witness states, that he does not know which sum has been paid for each sort respectively. This, however, would not perhaps be a decisive objection, though it is of importance to the rector that he should not be left in any doubt as to what each payment applies to; he is entitled to know clearly when he is to have 4*d.* and when 3*d.*; if that is left in uncertainty, he demands it at his peril. But this might perhaps be sufficiently cleared up, if it were sent to an issue.

But the next modus is open to more objection; for every milch cow and calf 4*d.*, and for every heifer and calf 3*d.*, in lieu of the tithes of calves and milk. This I suppose is meant to cover the tithes of all the calves and milk on the farm. But the union of two articles that are distinctly titheable in one customary payment is always objectionable; there cannot be a payment of one thing in lieu of another that is distinct. Now the tithes of milk and calves are quite different; the latter are subject to the rules that govern the tithing of animals; the right attaches when they are born; but milk is titheable each day, according to a certain rule; it must be taken on the spot where the animal is milked, and is equally due whether there is or is not a calf. How then can one payment cover both? The consequence would be, that cows might be introduced without calves; the rector would then be entitled to nothing, and yet would be precluded from the tithe of the milk. If it

The union of articles distinctly titheable in one modus objectionable.

1821.

SHORT
v.
LEE.

be said that in such a case the modus does not apply, then they have claimed too general an exemption; it ought to have been more correctly stated.

The modus for the agistment of cows, I do not see any objection to in point of law; but it is singular that when the right to agistment tithe must have extended to various animals, there should be a modus in the solitary instance of cows, but not in any other.

The next modus is void on the face of it, at least as it is applied. For every hogshead of cyder 3*d.*; if we are to understand that to be for cyder only, it is not the question in the cause; the Plaintiff does not claim tithe of cyder, nor am I aware that any such tithe is known to the law. It is a manufactured article, and the rector can claim the raw material only, except where custom makes a difference. In *Edgerton v. Follet (a)*, a modus of 4*d.* for every hogshead of cider in lieu of the tithe of orchard fruit, was held to be void. If, therefore, this modus is to be understood in the manner in which the witnesses state it, namely, as in lieu of apples and fruit, then, according to that case, and on every principle, it is bad in point of law; for the consequence would be, that if they made no cider, the rector would have no tithe of apples. And a modus leaving it in the option of the farmer, by not manufacturing the raw material, to exclude the rector from his common law right, making it perfectly uncertain, is necessarily bad.

The next is, for fruit, including board apples, 1*d.*, in lieu of tithes of apples, pears, and other fruit. I

(a) 2 *Gwill.* 535.

own I was surprised to see in the answer this extraordinary combination, a payment being first stated, that, if good for any thing, covers apples; and then another modus for hoard apples; so that there are two moduses for the same article. Then comes a modus for garden-stuff, and if that means the produce of gardens generally, it includes apples again; the first modus is not confined to apples made into cider, and thus there are three payments for one article.

1831.
SHORT
v.
LEE.

The evidence in support of these moduses is partly parol and partly written. The witnesses do not exactly agree with each other, but all appeal to reputation in support of their own statements. This shews, that though evidence of that description is properly admitted, yet we ought to be extremely careful with respect to it when we find witnesses differing, and yet each subjoining to his statement a reputation coinciding with his own opinion. The first written evidence consists of two books of former lessees, which shew the actual collection of the tithes, and are therefore properly admitted. The first is from *Easter 1771*, to *Easter 1772*, and there are these entries: meadow grass 4*d.*, land grass 3*d.*, cow and calf 4*d.*, heifer and calf 3*d.*, vere cow 2*d.*, garden and fruit 1*d.*, *Easter* dues 6*d.*, which one of the witnesses supposes to cover the gardens also; cider 3*d.* per hogshead; hoard fruit 1*d.*, stating a distinct modus for hoard fruit. In the other book there is entered: for every acre of pasture and arable pasture hay 4*d.*; for fruit, including hoard apples, $\frac{1}{10}$ th when gathered, and when sold out of the parish $\frac{1}{10}$ th; so that if this book be correct, it destroys the modus for apples, as they paid tithe in kind in both cases.

In addition to this evidence, two cases in the Exchequer have been alluded to; these decisions are cer-

.1821.

SHORT
v.
LEE.

tainly not evidence, the records not being produced, and even if they were produced, it would be a question whether they could be received, the rector not having been a party, but his lessee only. But if admitted, what would they prove? These moduses were not in dispute; the question was as to the mode of tithing oats and barley, and there moduses were admitted. The cases cannot therefore be stated as more than the recognition of the lessee, that he thought that there were such moduses; but we are to consider not what was the notion of any modern lessee, but what was the usage long before.

The ecclesiastical survey does not furnish much assistance; it proves too much, if it is to be presumed that there was no tithe of any of the articles not mentioned; for there is no express mention of tithes of hay, milk, or calves, yet both sides admit that they are titheable, disputing the manner only, with respect to which this gives very little light. There must have been other articles titheable; and we do not know what is included in *aliis decimis*. The total value is stated at 62*l.* 14*s.* 6*d.*; according to the rolls, the average is about 71*l.*; the variation is not such as to prove that one of them must be incorrect, the survey never being considered an exact criterion of value. As to the mode of payment, it is totally silent. It was not requisite in the survey to state any thing more than the value; it is therefore generalized, mentioning only some of the larger articles, as *garba*, and *lana*; the articles now in dispute were then of comparatively small value, the hay being, on an average, only 50 shillings per annum, and, therefore, they were the less objects of particular notice in the survey.

This being the evidence on the part of the Defendants, have they made out their moduses? some of them, as I have

1821.

SHORT
v.
LEE.

have observed, are bad in point of law; as to some, there is contradictory evidence; with respect to the rest, there is evidence of the actual pendency of the tithes, according to them, for a considerable period, carried further back by the evidence of reputation. I agree that we ought to be very careful in disturbing an ancient usage; for, as was observed by Lord *Hardwicke*, (a) parties act, and purchases are made upon the faith of the moduses; and all the property in the parish is governed by the subsisting rule that has been suffered to prevail, and by the continuance of which, no one is injured. The Court, will not, therefore, be willing, when there is contradictory evidence, itself to decide against a long established usage, if it can be more satisfactorily laid before another tribunal. This must not, however, be carried too far; it is not to be assimilated to other cases of usage; there is no adverse possession, but a constant acknowledgment of title by payment of the composition; and though the composition has not been changed, that does not take away the power to change it. Usage, however, and long enjoyment, though not to be pressed as positive evidence of title, is entitled to considerable weight. It is carried back by evidence of payment, and by reputation, for a considerable period, and that, if not contradicted, is a fair ground for presuming that it has existed from the time necessary to give it validity, that is, from the time of legal memory.

But beyond the time to which the evidence extends, the Defendant's case rests upon presumption only; the rector then produces the accounts of the proctors, in the fifteenth century, to shew what the state of things was then. What could be better than these important documents, to supply the want of evidence at that period?

(a) 2 *Ves. sen.* 510.

1821.

SHORT
v.
LEE.

The Defendants, however, objected to their reception, and thinking the subject of importance, I was desirous that it should be canvassed, and that if possible any new light might be thrown upon it. But I still think they ought to be admitted. When an enquiry is carried back to such a remote period, the dearth of evidence naturally leads the Court, from its desire of ascertaining the truth, rather to let in, than to exclude what is offered, taking care always not to exceed the bounds of legal rules. These documents possess those qualifications which always make the declarations of deceased persons evidence, namely, that they were persons having a competent knowledge, or whose duty it was to know, having no motive to make a false representation, and their written declarations being directly at variance with their only interest. Such declarations are universally evidence; as in the cases of the entries made by the attorney or the midwife; the principle has even been applied to a letter written by a third person, and recognized and preserved by the individual to whom it was addressed, who had a contrary interest. (a) This principle was much discussed by Lord *Ellenborough*, in *Higham v. Ridgway* (b); after reviewing the case in *Strange* (c), where the entry, by an attorney, in his book of a sum charged and paid for preparing a surrender was admitted, he states that, in the case before him, "the entry made by the party was to his own immediate prejudice, when he had not only no interest to make it, if it were not true, but he had an interest the other way, not to discharge a claim which it appeared from other evidence that he had," and he was, therefore, of opinion that it ought to be received. The rest of the Court concurred in that opinion, and though Mr. Justice *Bayley* subjoined

(a) *Roe v. Rawlings*, 7 *East*, 279.(b) 10 *East*, 109.(c) *Warren v. Greville*, 2 *Str.* 1129.

as an additional circumstance necessary to make the entry evidence, that the party writing it might have been examined to the fact in his life time, yet none of the three other judges add that qualification; and Mr. Justice Bayley himself, in a subsequent case, (a) states the rule to be, that "if a party who has knowledge of the fact, make an entry of it, whereby he charges himself, or discharges another, upon whom he would otherwise have a claim," it is admissible in evidence. This is a corrected statement by himself, in which, after further consideration, he lays down the rule in the same manner with the other three judges, and in terms applying exactly to the present case.

1821.

Smoot v. Lee.

An entry by a deceased person may be evidence, though he could not in his life-time have been examined to the fact.

This being the general principle, is there any sound distinction to be taken from the circumstance of the persons making the entries being members of the college? It is said that they had a permanent interest in making the entry, and a temporary interest only on the other side. But observe, by the entry the party charges himself with 20l.; his interest would certainly lead him the other way in that particular transaction; and, therefore, credit is given to him. Nor can he have any motive of interest acting on his mind to induce him to falsify it; for though he has a permanent interest in the tithes, yet he could never derive any benefit from the entry. It could not be evidence for him; if any question arose during his life, it would be an objection that it was made by himself; and it cannot be supposed that he was anticipating contests after his death. Therefore, there is in fact no set off of interests; the interest is all one way; then how does it differ from the ordinary cases? In the case before Lord *Ellenborough* respecting *Totkell Fields*, the same objection was made, but he had no difficulty in overruling it.

(a) *Doe v. Robson*, 15 *East*, 35.

1821.

SHORT
v.
LEE.

If we compare these with stewards' accounts in general, they are evidence of much more importance: consider the duty that the proctors had to perform; knowing that they were to be accountable, and their accounts subject to revision, and being passed with exact forms, similar to those by which the Crown accounts are passed in the Exchequer before the proper officers, with a *quietus* given at the end of them. It is said they are only copies made up from other papers; that is the same with the accounts in the Exchequer; they are the joint documents of both parties; and they are not the less the accounts of the accountant because they are checked by the other party. They are the more solemnly prepared and assented to, and are therefore the more to be depended upon. One circumstance I wished to know, whether they were to be considered as perfect without being signed and sealed? I have enquired, and I find that the records in the Exchequer have nothing of the kind, but end, like these, with *sic quietus recessit*.

On this ground alone I think these documents are admissible; and, with respect to the other ground, I am strongly inclined to think that no distinction exists between a corporation sole and aggregate, and that though corporation books are not evidence on other subjects, yet they may be on this. The case of an impropriator in fee, it may be said, is distinguishable, as he has a permanent interest; but if there was at the time an absence of all prospect of litigation, and it does not appear that any advantage could be gained by the entries, I cannot see why the rector's books, which are received when the rectory belongs to an individual, should not when it belongs to several, having only the same extent of interest. All the cases, *Illingworth v. Leigh*, and those in *Bunbury* and *Viner*, are the same way, and seem to me, if it were necessary to have re-
course

course to them, strongly to establish the admissibility of the evidence on the second ground; but on the first ground, I think it clear that it would be impossible to reject it.

1821.

SHORT

v.

LEE.

Then if these documents be properly received, their effect is next to be considered: much learning and ingenuity has been exercised upon them; and I cannot think that this part of the subject is not one which the Court is bound to investigate, and to which it must apply its own judgment. It cannot be its duty to transfer the consideration of these numerous records, in an unknown and antiquated language, to a tribunal which, however excellent it is in determining the effect of parol, must, with respect to the import of written documents, take its views from the Judge. As to directing an issue to determine the question of evidence, it would be perfectly novel for a judge in equity to send a cause to a jury to decide a point of law. It is for the Judge to decide points of evidence as they arise; it would, therefore, be sending it to be decided by the Judge who might happen to preside, subject to revision by the Judge who sent it, and subject to be then sent back for another trial.

After examining these rolls over and over again, I cannot find the least ground for doubt. Upon the hypothesis that all the tithes were due in kind, and that the mode of collecting them in each year was by the sale of each article upon a separate contract, in each case made between the proctor and the occupier, every roll exhibits the account which in such a case would be expected; every word is used in its proper sense; every circumstance is accounted for, and corresponds with the hypothesis. But upon the contrary hypothesis, that the moduses contended for were at the time the standard for the

1821.

SHORT

v.

LEE.

the payment of the tithes attempted to be covered by them, and had been so for 200 years before that time, it becomes necessary to search out for some remote and unusual interpretation of every word and circumstance.

Hay is insisted to be covered by two different moduses of 4*d.* and 3*d.* according to the nature of the land, and computed at that rate by the acre. In no one roll is there any reference to any such division, distinction, or computation; from whatever person or place it is received it is always under one uniform denomination, and a variable price fixed by sale in each particular case, without ever in a single instance alluding to any fixed payment. On the contrary, when the articles are united in one payment according to the modus, they are uniformly separated by the rolls.

The terms *venditio* and *vendit.* applied indiscriminately throughout the rolls, to articles admitted to be still titheable in kind, as well as to those attempted to be covered by moduses, could not in the former cases have had any reference to any immemorial composition, because as to them no such composition existed. Why then is a different meaning to be applied to the same terms in the same rolls, when applied to the latter cases? In the instances of *garba*, *lana*, *agnorum*, *porcellorum*, &c., the terms must be understood in their usual sense, importing a sale of the tithe in kind. Why then are the same terms in the same documents to have a strained and unusual interpretation, when applied to hay, calves, and apples? The proposed construction cannot apply in some cases, as when the tithe of calves of one person is sold to another by name, and when the tithe calf is sold to the butcher.

How did it happen that in no one of the thirty-six rolls, during a period of nearly a century, each containing details

details of such minute particularity and correctness, there should never be a single word of reference to the ancient modus or composition, which, if it existed, must in every instance have been the sole criterion to be referred to, and which the occupier must, in every case, from regard to his own interest, have uniformly exacted a compliance with? If fixed money payments were alone due in each year, the tithe collector never could, in any instance, have possessed the article in kind; whereas, this appears to have been the case in several instances, in hay, milk, calves, and apples; hay is laid up for use; milk is delivered and carried about for sale, and women paid for the sale; apples gathered, &c.

1821.

SHORT
v.
LEE.

The variations in price, applied to a titheable article, apparently of the same denomination and description, is utterly irreconcilable with the supposed existence of a fixed immemorial payment, but is accounted for if the price depended on the value of the article, and the contract made on the sale of it. Seven different sums, from 31*d.* to 18*d.* follow each other in the same roll, each stated to be received from different persons for apparently a titheable article of the same description, *pro uno vitulo decimali*; whereas, upon the supposition of the moduses, no separate payment ought to have been made for the calf, without the cow or the heifer, neither of which is mentioned; nor in either case could there have been any other payment than 4*d.* or 8*d.*, which is not the sum paid in any one of the seven. A similar observation applies to the variation in the payments, when made for the entire calf, and when made for the tithe of one or more calves, short of the number necessary to entitle the rector to an entire calf. Thus when 2*s.* is paid *pro uno vitulo decimali*, 1*d.* or 1½*d.* is paid *pro decima unius vituli*, 6*d.* for the tithe of three calves, 2*d.* for the tithe of two calves, and a fractional sum for the

1891.

SHORT
v.
LEE.

the tithe of half a calf; all explicable upon the known right to the tithe of the odd numbers, but wholly incompatible with a fixed sum of 4d. or 3d. for each calf; the price never could diminish when the number increased, and half a calf could never be subject to any payment.

The sale being made to the occupier himself, *sibi vendito*, is incompatible with the idea of its being the sale of a *modus*. Sometimes the article is not sold, but is accounted for in a different way; as in the account of the carriage and saving of hay *non vendito*; and of the hay *quod parochiani noluerunt habere*; which is laid up *pro advenientibus per annum*. The meaning of the word *vendito* appears also from its opposition to *retento*; we have, *pro alio vitulo vendito* and *pro alio vitulo retento*. And how can the terms *venditio albedinis* and *lacticinii* as a head, be reconciled with the fixed *modus* for a cow and calf, and for a heifer and calf. The term *albedo* evidently applies, according to every interpretation, to some titheable article, the produce of milk, and the rolls state it to have been the subject of sale. Expences are charged *ad vendendum albedinem*; the article is sold *per æstatem*, arising evidently subsequent to *Easter*, when alone any payment on this account was to be made according to the *modus*. The payment of the price agreed upon is sometimes by instalments, at different periods of the year; which must have been regulated by contract.

The terms applied to apples, are equally inexplicable on any other hypothesis than that of their being due in kind; *venditio pomorum*; *collectio pomorum*; *pro modis pomorum decimal. totius parochiæ* — *pretium modii* 3d.; *et ab* 6s. 9d. *pro* 3 quart. and 3 bls. *pomorum decimal. totius parochiæ*. Tithe apples and pears sold; the residue of the tithe apples made into cider.

The

The opposition between the rolls and the moduses, is the greater, from their applying each to the whole parish; the one prescribing the rule which ought to have been, and the other shewing the rule which was in fact universally pursued with every occupier in the parish. The rolls were not loose memoranda made for private use, or that might never be seen or acted on, or to be used only to establish a claim upon the land-owner or occupier. They were made solely for the inspection and guidance of the rector and of the tithe collector, to settle *inter se* the exact state of the annual receipt and out-going, drawing with a minuteness of detail to the lowest fraction, verified by vouchers, scrutinized by auditors appointed for the purpose, comparing in every instance, the charge with the voucher, (*cum ista cedulâ particulariter computato*) and by which the accountant was to be called upon personally to answer to his employers, according to the sum admitted to have been received.

1821.

SHORT
a.
LEE.

During the whole of this period there does not appear to have been any dispute, or any prospect of dispute, respecting the mode in which any of the tithes were to be rendered in any part of the parish. From the first roll in 1401, to the last in 1495, there is only one entry of any expense incurred by litigation. *In una citatione ad citandum William Hoppyng pro decimis vitulorum injuste decimatorum*; the amount of which was two-pence. The same mode of collecting the tithes appears to have been invariably and uninterruptedly pursued for nearly a century. There was, therefore, no motive for invention or falsehood, no inducement for not relating truly and correctly what passed within the year, much less for a series of officers to surcharge themselves falsely with sums so greatly exceeding those which, according to the moduses, were the sums really due and received, without a single one in a single

1821.

SHORT
v.
LAW.

instance telling the truth in favour of himself. The only conclusion must be, that the rolls represented the payments that were made, and that the payments were made because they were conformable to what was universally known to be the rule by which alone they could be governed, *vis.* by the common law of the land, unvaried by any fixed or binding composition.

A great deal has been said about the duty of the Court to direct an issue, but I wish it to be understood that it is my opinion, that there is no rule, that a defendant setting up a *modus* as a defence to the rector's bill for an account of tithes in kind has a right, as a matter of course, to demand an issue. If the Court is satisfied, that the *modus* set up is upon the face of it bad in law, or is, by the evidence, proved in the judgment of the Court not to have immemorially existed in point of fact, it is under no obligation to send the question to be tried by a jury. It is the duty of the Court in such a case to give an immediate decree for the rector for the account of tithes in kind, which is the necessary consequence of his common-law right, without exposing him to the expence or risk of an issue. It is only when the Court entertains a reasonable doubt as to the fact, and when it depends on evidence, the effect of which can be better ascertained before a jury, that the Court, for the information of its own conscience, has recourse to this auxiliary mode of obtaining it.

The account of tithes subtracted, when resisted by a claim of *modus*, can be granted only in a court of equity. The remedy under the statute of *Edward VI.*, which applies only to *prædial* tithes, is for a penalty, and in such a case would not lie; the ecclesiastical court might be stopped by prohibition. The Court, by

its constitution, must have the power of deciding incidentally every question of law or fact which arises upon a subject over which it has complete jurisdiction. The trial by issue forms no necessary appendage to the proceedings of a court of equity. It is only through the medium of a fictitious form that the Court is able to obtain this auxiliary enquiry; the expence and delay attendant on it are only to be incurred when the Court, in the exercise of a sound discretion, may deem it necessary, except in the cases where practice has made it a matter of right, as where required by an heir at law or a rector.

1821.

SHORT
v.
LEE.

The cases in which courts of equity have in the first instance, and without any reference to an issue, decided against moduses on the ground of rankness, are all instances of this principle being acted on. The MS. report of what is supposed to have been said on this subject, at the bar and on the bench in the Court of Common Pleas in the year 1748, in the case of *Sansom v. Shaw* (a), is not, I think, entitled to any authority. I have already noticed the erroneous doctrine which the same report attributes both to the bar and to the Court respecting the time necessary to give validity to a modus. There is a similar inaccuracy on the present subject. The report represents Serjeant *Belfield* to have stated, that the name of rankness, applied to a modus, was first introduced by Lord Chief Baron *Ward*, who, he says, "was a great patron of the clergy, and carried their rights a great way, as was another great man that afterwards came into the Court of Common Pleas from the Exchequer." Lord Chief Justice *Willes* is made to say, as to rankness, "It is said, and I am afraid truly, that there have been

(a) 2 *Guill.* 806.

1821.

SHORT
v.
LEE.

“ many cases determined upon this footing ; the fewer
 “ the better ; but I am glad they are not in print, for
 “ then they might have misled more than they have
 “ at present. The reason of those determinations I
 “ cannot guess, unless it be that *boni judicis est ampliare*
 “ *jurisdictionem.*” *Burnett J.* is made to say, “ My
 “ brother *Belfield* has given us the history of the
 “ beginning of this doctrine of rank modus in Lord
 “ Chief Baron *Ward*’s time, and I have had another
 “ case given me by a learned judge, which shews the
 “ end of it. The case I mean is *Giffard v. Webb*, in
 “ which *3d.* for a lamb was decided to be a good
 “ modus in the Exchequer, and in the House of Lords
 “ upon appeal in 1735.” Mr. Justice *Burnett* is made
 to add, “ and there was an end of rank moduses, I
 “ believe they have never been heard of since.”

These extraordinary observations were not called for as necessary to the decision of that case. The modus was not of a magnitude to be objectionable on the head of rankness, and so the jury who had found in favour of it upon issue joined in prohibition had decided. Had the modus been open to the objection of rankness, the objection could not have been taken in the shape in which it was presented to the Court, *viz.* on a motion in arrest of judgment, rankness not being in itself an objection in point of law to the validity of the modus, but operating as internal evidence to disprove its immemorial existence, and so the Chief Justice decided. But the *dicta* ascribed to the Court, besides being irrelevant, were entirely unfounded. The objection of rankness neither did nor could owe its origin to Lord Chief Baron *Ward* ; nor did, nor could it terminate with the case of *Giffard v. Webb*. The case of *Giffard v. Webb* did not decide that rankness could in no case afford an objection to a modus, but only that the magni-
 tude

1821.

SHORT
v.
LEE.

tude of the sum in that case was not such as to afford a presumption against the antiquity of the modus. The contrary had been decided in respect to a modus of the same amount, set up for the same article in the reign of William III., in the case of *Layfield v. Enticknapp*, cited by counsel in *Sansom v. Shaw*, from *Dodd's MS.*, under the name of *Layfield v. Dewlapp*, and reported in *Gwillim*, (p. 560.) and in *Wood*, (vol. i. p. 383.), in which an issue was at first granted; but the Plaintiff having refused to try it and moved for a rehearing, the Court unanimously agreed that the custom was not good, and that there ought to be no issue. This instance verifies Lord Eldon's observations on the case of *Sansom v. Shaw*, that rankness was known to Courts of Equity long before *Serjeant Belfield's* time.

In *Bishop v. Doderidge* (a), in 1704., *Powell, J.* said, that while he sat in the Exchequer, if a modus was too high they always disallowed it. In *Benson v. Watkins* (b), the Court of Exchequer disallowed a modus too near the value as rank. In the year 1745, three years before the case of *Sansom v. Shaw*, and fourteen years after *Giffard v. Webb* was decided in the House of Lords, Lord Hardwicke, in *Ekin v. Pigott* (c), made a decree for tithes in kind in opposition to a modus, upon the ground of rankness, without sending it to an issue, saying, that it appeared to be nothing more than a composition upon agreement, which parsons had submitted to in succession from time to time, and merely a personal payment, not a composition real. The same great Judge, in *Moore v. Beckford*, Hil. 1750, cited by *Blackstone, J.*, in *Pike v. Dowling* (d), said he should be ashamed to send a modus of 30*l. per annum*, to be tried by a jury

(a) 2 *Gwill.* 587.

(b) *Burb.* 10.

(c) 3 *Atk.* 298.

(d) *Gwill.* 1166.

1821.

SHORT
v.
LEE.

where the real value of the tithes was not above 60*l.*, and decreed for the Plaintiff with costs.

In *Hulse v. Monk* (a), the Court of Exchequer, in 1769, set aside two payments, alleged to be moduses, on the ground of rankness; and so in the same year in *Wood v. Harrison* (b). The Court of Common Pleas, in *Pike v. Dowling*, held very different language from that attributed to it thirty years before, in *Sansom v. Shaw*. "Courts of Equity," they said, "which are judges of both the fact and the justice of the case, may certainly over-rule a modus, when they see that the internal evidence against the possibility of its immemorial existence is so strong, that it would be nugatory or oppressive to send it to be tried by a jury." And *Blackstone*, J. says, "So it was done by Lord Hardwicke, in *Moore v. Beckford*: so in *Torriano v. Legge*, six different moduses were over-ruled for being too rank, without directing an issue to try any of them."

In *Morgan v. Neville* (c), in 1773, the Lord Chief Baron of the Exchequer said: "It is not an universal rule in questions of this sort to refer ourselves to a jury. It is only when there is a doubt, that we do it, both in cases of moduses and of customs." In *Bishop v. Chichester* (d) in 1781, the Chancellor, notwithstanding the decision of *Gifford v. Webb*, (which was cited in the argument,) refused an issue to try a modus of 3*d.* for a lamb. He said, "that the rankness of a modus depended on the history of money, and certainly was in itself a question of fact and not of law; but although it was a question of fact, it was a question that the Court had frequently decided, that

(a) *Guill.* 960.(b) *Guill.* 970.(c) 4 *Guill.* 1047.(d) 6 *Guill.* 1318.

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“ this modus was notoriously rank ; and if so, there was
 “ no reason why a Court of Equity should direct an
 “ issue to try a fact of which it was perfectly satisfied.”

1821.

Suor
 v.
 Lxx.

The practice has since been conformable to these authorities. In *O'Connor v. Cooke* (a), though the Chancellor says, that “ courts of equity in ancient times were more in the habit of taking to themselves the decision of questions of fact than they have thought it wise and discreet in later times ; and that if any reasonable doubt had been raised upon it in the evidence, it has been of late thought wise and discreet to send the question of fact to a jury.” Yet, he adds, that “ there is no doubt, according to the constitution of this Court, it may take to itself the decision of every fact put in issue upon the record.” And the same great authority says, in the case of the *Warden of St. Pauls v. Morris* (b), that “ upon the payment, as it stood at the original hearing in opposition to the claim of tithes, he should have thought the Court had a right to refuse, but, if asked, ought to have directed an issue.” Referring to the same case in *Hampson v. Hampson* (c), he says, “ My opinion always was, that this Court was not justified in sending the question to a trial ; my opinion being that if, that evidence having been received, the verdict had been contrary to that which was found, I should not have held myself bound by that verdict.” The same great Judge in *Bullen v. Michell* (d) expressly declared his opinion, that the Court of Exchequer ought not to have granted an issue in that case. Lord Redesdale delivered a similar opinion in the same case. In the late case of *Morgan v. Tyler*, the Court of Exchequer

(a) 6 Ves. 671.

(b) 9 Ves. 168

(c) 5 Ves. & Bea. 43.

(d) 2 Price, 399. 4 Dow. 288.

1821.

SHORT
v.
LEE.

decreed the account of tithes without any issue, notwithstanding the evidence in support of the modus. It was the contrariety of the evidence, and the doubt as to the fact, which occasioned an issue to be granted in *Drake v. Smith*.

There is no case in which an issue has been granted, where the Court has been satisfied, that the alleged modus had its origin since the time of legal memory. The evidence to disprove the immemorial existence of the moduses in this case is entirely written, contained in thirty-six ancient rolls in a dead language, embracing many items of different kinds. Their construction has called forth the application of learning, critical and accurate investigation and collation, frequent and useful revision, and the assistance of glossaries and antiquarian knowledge, to form a correct judgment respecting their meaning and import. Could this be done before a jury at *Nisi Prius*, with the same effect as it may in a court, assisted by the learning and industry of the bar, during a hearing of many days, devoted entirely to this one subject, and with a knowledge of the whole of the cause to which the enquiry belongs?

It is not a case in which there is any contrariety in the evidence, or in the conclusions to be drawn from it. All the parol evidence applies to one period. All the ancient written evidence to another; the inference afforded by the one does not in the least interfere with that derived from the other. In the earlier period, the tithes were rendered in one mode; in the later in a different mode: anciently by a contract of sale of each article, made each year by agreement between the annual officers and the occupiers; in modern times, by compositions made between the lessees and the occupiers. There is no question of fact to be left to the jury. It is merely a question of law; as to the admissibility of these rolls; and,

and, when admitted, a question as to their construction and effect. If the case were before a jury, they ought to take the directions of the Judge on these points : and the question would ultimately come for the revision of the Court directing the issue, which, as Lord Eldon said, in *Hampson v. Hampson*, if it disapproved of the conduct or opinion of the Judge or the jury, would not hold itself bound by the verdict. To what purpose then would it be, to subject both parties to the additional expence and delay of an issue, only to bring back the case for the final decision of the Court, that has already formed a clear and decided opinion, upon which it must at last be bound to act?

1821.

SHORT
v.
LEE.

I am perfectly satisfied that there ought to be no issue, except upon the *modus* for colts, if the rector insists upon it; for I do not find in the rolls any payment for a colt but that of 1*d*. As to the rest, there must be an account.

Reg. Lib. B. 1820. fo. 891.

ELLISON v. BIGNOLD.

March 7. 9.

THE bill in this cause was filed by ten of the directors of a society called the National Union Fire Association, on behalf of themselves and the other members, against *Thomas Bignold*, and another person, also directors of the same society. The Association was formed by a deed, dated in *March*, 1819, and expressed to be made between the persons, whose names were or should be subscribed in the schedule thereto, of the one injunction, the Plaintiffs not having made use of the powers of regulation given them by the deed.

On a bill by some directors of an insurance company, constituted by deed, against another director, alleging misconduct, the Court refused to interfere, by continuing an

A voluntary society for insurance, by way of mutual guarantee, is or is not illegal, according as the shares of the money laid up are or are not transferable generally to persons not members.

part,

1891.

ELLISON

v.

RICHARD.

part, and certain trustees of the other part, by which it was witnessed, that the persons parties of the first part had resolved and agreed, and did by way of declaration and not of covenant, spontaneously and fully consent and agree to establish a voluntary fire society, for the purpose of securing to the members pecuniary remuneration for losses by fire. The parties of the first part then covenanted with the trustees, to observe and perform the articles and provisos of the deed.

The deed contained various articles, the principal of which were to the following effect. Every person executing the deed or any other instrument obliging him to its stipulations, became a member of the society, and was to receive a part of the annual premiums, and to bear a part of the losses, in proportion to the sum in which he was insured. The management was to be committed to twelve directors, who were to hold their offices for life, with salaries and an allowance for attendance on the business of the society. The directors were to fix upon a seal for the society, and to select one of their number to be president, and they were to appoint the trustees, auditors, secretaries, treasurers, surgeons, solicitors, surveyors, agents, clerks, and other servants, with some exceptions. The directors were to choose from two to five members to be auditors, who were to examine and audit the accounts of the society relating to the policies, cash, and other effects, quarterly at least; the auditors were, from time to time, to make a report of their proceedings to the directors; and the directors were, as they should think fit, to order money balances of all such accounts, or any other accounts, whether audited or not, to be paid into the hands of the treasurer or treasurers, and securities to be deposited with the trustees. The funds of the society were to be applied to answering the policies and indemnifying the directors and trustees, and
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any deficiency was to be supplied by the members at large proportionally. There was a proviso for filling up the places of directors who should die, desire to be discharged, or for six months neglect to act; and if any director should refuse to act in the department assigned to him by the majority, or should be guilty of a breach of trust concerning the society, or become bankrupt, take the benefit of any act for the relief of insolvent debtors, or execute a composition deed, he was to be discharged from his offices. The directors were empowered to make other orders and bye-laws, so that none of them should be repugnant to the general principles of the deed.

1821.

ELLISON
v.
BIGNOLD.

By the 24th article it was recited that the Defendant, *T. Bignold*, was the projector and founder of the society, that he had been at great expence in bringing it to maturity, and that it was likely to derive great advantage from his knowledge and experience, and that he had agreed and did thereby agree for the space of three years to advance 10,000*l.*, to answer any immediate calls, and also, while entitled to the allowance therein-after mentioned, to pay the rent and taxes and other contingent expences of the houses and offices used for conducting the business, and to provide a secretary, clerks, and servants, who were to be approved of by the directors, and to be subject to be dismissed by them. In consideration of which it was agreed that *Bignold* should be entitled for his life to receive and take 10*l.* *per cent.* upon the premiums, when they should amount to 30,000*l.* *per annum*, 5*l.* *per cent.* upon the next 20,000*l.*, and 2*l.* 10*s.* *per cent.* upon all further premiums, over and above the expences of conducting the office, to be paid by him as aforesaid: he was also to have a power of appointing, by deed or will, an allowance of 7*l.* 10*s.* *per cent.* upon the premiums for a term of

1821.

ELLISON

v.

BIGNOLD.

of 14 years from his death: if he made no appointment that allowance was to be paid to his next of kin.

This deed was only executed by five or six persons, but it appeared that the policies contained a clause, by which the persons accepting them bound themselves to the performance of the covenants and articles in the deed; about 2000 insurances had been effected in this manner, making the parties insured members of the society.

The bill, imputing several acts of misconduct to the Defendant *Bignold*, to whom the management of the business had been principally confided, prayed an account and injunction against him; and an injunction was obtained by motion *ex parte*, to restrain him from receiving money on account of the society, from acting or intermeddling in its business, and from destroying, or obliterating, the books, papers, and documents belonging to it, in his possession.

A motion was now made to dissolve the injunction. By the affidavits on both sides it appeared that the business of the society had, from its commencement, been conducted at *Bignold's* house, until the middle of *November* last, when, in consequence of some disputes, the Plaintiffs determined that it should be carried on at another place, and issued an advertisement announcing the removal, and cautioning the public against making payments to *Bignold*; he, on the other hand, published an advertisement denying any removal, and continued to transact business at the former office, retaining the books there, and receiving some premiums. It was stated that he had torn out of a receipt-book the counterparts of some receipts he had given for premiums paid to him; this charge he explained by saying, that, being personally liable for the sums in question, which

which did not amount to more than 30*l.*, he had taken these counterparts out of the general book as memorandums or vouchers for himself. It appeared that he had withdrawn from being one of the sureties for the payment of the stamps, and some of the duties had not been paid; in consequence of which proceedings against the society had been threatened by the Stamp Office. The Defendant *Bignold* had not advanced the 10,000*l.*; he stated that he had only guaranteed that sum in the event of a deficiency of funds; and that the clause relating to it had been introduced into the engrossment of the deed without his knowledge: he also insisted that he had disbursed, for the purposes of the society, more than he had received. No auditors had been appointed according to the deed; one of the directors had died, and another had, as it was stated, become disqualified by non-attendance; but the vacancies had not been filled up.

1821.
ELLISON
v.
BIGNOLD.

Mr. *Wetherell* and Mr. *Glyn*, in support of the motion.

This association is illegal under the stat. 6 *Geo.* 1. c. 18. s. 18.; it assumes a corporate character, by having a common seal. One of the provisions is, that the directors who sign the policies are not to be personally liable: thus the insurers, who are drawn in to advance their money, have no one whom they can sue. But if it be legal, as it proceeds upon the principle of mutual guarantee, it makes all the insurers partners, and the bill is filed not for the purpose of dissolution, but treating the concern as a subsisting one, and seeking an account of what is due to it from one partner. According to *Waters v. Taylor* (a), and *Carlen v. Drury* (b), a suit for that purpose cannot be instituted by members of such a

(a) 15 *Ves.* 10.

(b) 1 *V. & B.* 154.

society,

1821.

ELLISON

v.

BIGNOLD.

society, until they have resorted to the modes provided by their articles. The directors have the power of making bye-laws, to regulate whatever they may object to in the Defendant's conduct; if he has committed any breach of trust, they may remove him. The accounts should be submitted to the auditors; they should, as a preliminary to this bill, have tried at least whether the tribunal, and the system of rules that they have mutually agreed on, are not sufficient for the purposes of justice. They cannot take from the Defendant the benefit of those regulations, and apply at once to the Court, superseding the authority of the auditors, and putting the Master in his place. The inconvenience of having such a concern carried on under the direction of the Court, which must be the consequence, is obvious. This is not a case where an injunction is rendered necessary by any imminent danger of destruction; the acts complained of are of a trifling nature, and are readily explained.

Mr. Fonblanque, Mr. Raithby, and Mr. Shadwell for the Plaintiffs.

The statute of *Geo. 1.* was designed to operate only against undertakings likely to become mischievous to the king's subjects at large, and does not affect this case, where the dealings of the society are confined to its own members, nor does it apply where the shares are not transferable generally. *King v. Webb (a)*. The case of *King v. Dodd (b)*, was held within the statute, from the Defendants holding out a delusive condition that the subscribers should not be accountable beyond the amount of their shares. In *Carlen v. Drury (c)*, the scheme was to sell beer to the public generally; so also

(a) 14 *East*, 406.(b) 9 *East*, 516.(c) 1 *V. & B.* 154.

in *Buck v. Buck* (a), and *King v. Stratton* (b), in which the statute was held to apply. It is clear that the grievance contemplated was a society with shares transferable generally; dealing with the public generally; but neither of these ingredients are to be found in this case. (c)

1891.
ELLISON
v.
BIGNOLD.

The question then is, whether the Defendant can be permitted to abuse the confidence reposed in him by the society. He is holding himself out to the subscribers, as the person who is to receive the premiums, which appears to be an usurpation of a power not given him by the deed; what he receives he refuses to pay over, and there are other acts of misconduct besides his refusing to advance the 10,000*l*. In general the Court has jurisdiction, notwithstanding any mode of adjusting differences that may have been agreed on.

THE LORD CHANCELLOR, during the argument, observed, that the directors had nothing to do but to appoint a treasurer to receive the money. If by such an appointment they displace the Defendant, then, supposing the society to be legal, they would give me a case in which I should be bound to act. As to the account books, the directors have under this deed a clear power to regulate the custody of them, and make any order that they may think fit. Should not they first make the necessary regulations, and then come here to prevent the Defendant from acting contrary to them? But if they do not avail themselves of these powers, then comes the question whether *Bignold* has not as much right as they to keep the books, so long as they do not appoint a proper hand to hold them. I do not see

(a) 1 *Campb.* 547.

(b) 2 *Campb.* 549. n.

(c) And see *Pratt v. Hutchinson*, 15 *East*, 517. *Davies v. Hastings*, 3 *M. & S.* 486.

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1821.

ELLISON
v.
BIGNOLD.

As to the effect of a proviso expressed to be "by way of declaration, and not of covenant."
Qu.

any thing in the deed giving *Bignold* the power of receiving the premiums. One difficulty is in the form of the deed; they resolve and agree together, but they protest against covenanting. What does this mean?

At the close of the argument, his Lordship delivered his opinion to the following effect. This is a bill by some persons, on behalf of themselves, and all others claiming an interest under a deed professing to form what is called a National Association, being a sort of insurance company governed by particular provisions. The question of the legality of this instrument is one that it is necessary for the Court to consider well before it decides that it ought to interpose at all. The general scheme of the deed, laying aside the nonsense about agreeing and declaring without covenanting, and looking at the part only where the members covenant with the trustees, binding themselves to perform the articles, is to form a society for the purpose of insuring the property, not of persons not belonging to it, but of those only who are members. It was constituted at first of only five or six persons, certainly not then enough to carry into execution this plan for the formation of a National Association; it is, however, intimated to me that there are now about 2000 members. Now, as I have understood the law, (I will not say that I am correct, but I believe that I am,) when a number of persons undertake to insure each other, if the shares and interests in the money that is laid up, be not assignable and transferable to any persons who are not members, the society is not illegal; but if there may be assignments and transfers of the shares, I have understood that that made it illegal.

But it is one thing to say that this association is legal, and another to say, that the Court is to lend its assistance

1821.

 ELLISON
 v.
 BIGNOLD.

sistance in carrying it on: It is difficult to refuse its assistance, when persons have equitable rights; but it is to be seen in what way those rights are to be enforced. Here, the directors are not to be personally liable, and the consequence is, as it strikes me, that if the parties are not driven by a sense of honour to pay the losses, I do not see how they are to be recovered. An individual cannot come here to have an account taken of the effects of all the members that are liable. The Court will not therefore be astute to find the means of deciding, that those who must deal without its assistance in ninety-nine cases, shall not do so in the hundredth.

Another consideration is, whether this plan can be carried into effect, looking at it with reference to the doctrine of those very distressing cases, where persons who have been expecting a provision for their old age, from benefit societies, have found themselves at last disappointed, from the societies being founded on erroneous principles. The Court has there been obliged to consider the whole as originating in a blunder, and to put an end to them by a dissolution. (a) Now, attending to this, we find here a covenant by *Bignold*, positive in terms, to advance the sum of 10,000*l.*, and I think that, in all probability, that sum was looked upon as what was necessary to set the society going. It is then to be considered, whether it can be carried on at all, if it has broken down by this article not being performed.

Another view of the case, of great importance, is this; that if it can be kept out of a Court of Equity, it should; and, therefore, the Court will not be astute to assist those who will not avail themselves of provisions in their deed, which might perhaps have kept it away;

(a) *Pierce v. Piper*, 17 *Ves.* 1. *Reeve v. Parkins*, *ante*, p. 390.

1821.

ELLISON

v.

BIGNOLD.

I say, perhaps; for all those regulations probably could not obviate the sudden evils which a mischievous man might effect. There are by this deed, directors, trustees, surveyors, auditors, &c., to be appointed; the general management is to be in the directors; they are to have meetings, and to be paid if they do their duty; if not, to pay forfeit; the auditors are to inspect the accounts; the directors are to say where the books shall be kept. All this should have been done, if the society had been regularly carried on, according to these articles. It does not now come before me, as if it had hitherto been conducted on the principles of the deed, but as a society that has not been, and perhaps for that reason, never can be conducted on those principles. I must consider the regulations of the deed not to have been attended to, and we must look upon it as a general partnership, not connected with, and depending on these particular stipulations; they cannot be relieved in the same way as if they had conformed to them. With these voluntary associations, the Court, before it interferes, must see that it is under an obligation to act, and that it can effectually act, for the benefit of the persons who have laid out their money in a way in which there must be so much difficulty in recovering it.

 March 9.

The *Lord Chancellor*, after observing that the society was not constituted according to the deed, said, they must invest themselves with the characters, that, according to the deed, they ought to have, before they came to the Court. If they would not act upon their deed, the Court could not manage their affairs for them.

Injunction dissolved.

1821.

PAGE v. WILSON.

ROLLS,
March 9.
13, 14.

THIS was a Bill by the rector of *Panfield*, in *Essex*, for tithe of wood and underwood. The Defendant, Sir *H. W. Wilson*, was the owner and occupier of some woods within the parish, called the *Priory Woods*, containing about 68 acres; the other Defendants were occupiers of other lands. By their first answer, they admitted the Defendant to be rector, and as such, to be entitled to all tithes in the parish, except the tithes of wood and underwood in the *Priory Woods*, and of hedges or hedgerows in the parish, not being of greater width than one rod, and producing wood used for fencing and fuel, in the parish, by the occupiers. They then set up a custom by which the *Priory Woods* were discharged from the payment of all tithes of wood and underwood, which custom they attributed to the woods having formerly, and before the time of legal memory, been the property of a monastery or priory, called *Panfield Priory*. They also stated, that from the time whereof, &c., by a certain antient custom, used and approved within and throughout the said parish of *Panfield*, which was and always had been within and parcel of the southern division or district of the hundred of *Hinckford*, in the county of *Essex*, and within and throughout all the other parishes within the said southern divisions and district of the said hundred, (being nineteen other parishes,) no tithes of wood or underwood, cut in hedges or hedgerows, not being of greater width than one rod, were ever due or payable to or for the use of the rector of the said parish of *Panfield*; but that by such custom all the said hedges and hedgerows, not being of greater width than one rod, had, during all the time aforesaid, and still were, exempt or discharged of and from the payment of all tithes of

Lands which were held discharged of tithes, before time of memory, by one of the alien priories, and coming to the Crown on their suppression, were granted to lay persons, and by them to one of the greater monasteries, in whose hands they remained till the dissolution, are no longer exempt from payment of tithes.

A custom in a part of a hundred, exempting hedges and hedgerows, less than a rod in width, from tithes of wood and underwood, is bad.

1821.

PAGE

C.

WILSON.

wood or underwood, arising and cut from the same. They stated that they had cut no wood or underwood, except such as fell within these exceptions, and the lopplings of some ancient pollards. There was an inaccuracy in one part of the answer, with respect to the exception of hedges, it being mentioned as extending only to hedges producing wood used for fencing and fuel, in the parish, by the occupiers.

The Defendants having afterwards discovered some material documentary evidence, obtained leave to file a supplemental answer; by which they stated that the manor of *Priors Panfylde*, in the county of *Essex*, and all the lands and tenements, meadows, feedings, pastures, woods, and underwoods, lying and being in *Panfylde*, in the county aforesaid, called *Panfylde Priory*, were part of the possessions of the late dissolved monastery of *Christ Church Canterbury*, and the convent of the same place, which was one of the greater monasteries, and came to the crown by the dissolution, suppression, grant, or surrender thereof, and by the statute 31 *Hen. 8.*; and that the said manor, lands, &c., were before and at that time, by prescription, composition, or other lawful ways and means, enjoyed by the said monastery and convent, free from the payment of any tithes, whether great or small, or of any modus in lieu of such tithes, or of any ecclesiastical dues whatsoever. They then stated a grant from the crown in the 30th *Hen. 8.*, of the manor of *Priors Panfylde*, and the lands, &c., called *Panfylde Priory*, to Sir *Giles Capell*, his heirs and assigns; the *Priory Woods* were, they believed, part of *Panfylde Priory*, and had never paid tithe of wood or underwood.

The earliest document produced was a grant of *Henry I.*, confirming to the monks of *St. Stephen of Caen*,
in

1821.

PAGE
9.
WILSON.

in *Normandy*, whatsoever King *William* his father, and Queen *Matilda* his wife, gave and granted to God, and to *St. Stephen of Caen*; amongst the estates comprised, was one thus described; "And in *Essex*, the little manor " of *Panfild*, with the wood and lawns thereto adjacent, " discharged and quit of all customs, which *Walerand* " *Fitz Ralph* gave, with all the tithe of other his land."

In the third year of *Henry* the Fifth, (1416, the year after the suppression of the alien priories,) the alien manor, called the priory of *Pamfild*, in *Essex*, with other possessions of the abbot and convent of *St. Stephen of Caen*, was granted to *J. Wodehous*, in fee. *Edward* the Fourth, in the first year of his reign, (1461,) granted the manor of *Panfild*, otherwise called the *Priory of Pamfild*, to *Gresilda Hinde*, in fee. (a) It appeared by recitals in certain letters patent of the 22d or 23d of *Edward* the Fourth, and in an act of parliament of the 7th of *Henry* the Seventh, that *Gresilda Hinde*, in the 11th of *Edward* the Fourth, sold the manor of *Panfild* to *Thomas* Archbishop of *Canterbury*, and enfeoffed certain persons of it to his use, by the king's licence; and in the following year, the archbishop and his feoffees, by the king's licence, conveyed it to the prior and convent of *Christ Church Canterbury*, and their successors. The grant to the prior and convent was ratified by the letters patent of the 22d or 23d of *Edward* the Fourth. The act of the 7th of *Henry* the Seventh, was made upon the petition of the prior of *Christ Church*, for the purpose of confirming the grant to that convent, notwithstanding the act of resumption of the 13th of *Edward* the Fourth, by

(a) The occasion on which the manor reverted to the Crown did not appear; it was probably by a forfeiture incurred in the course of the civil wars in which the country was involved at that period. In *Moran's History of Essex*, vol. ii. p. 407., *Henry* the Sixth is said to have granted it to *King's College, Cambridge*, in *February* 1460, shortly before his dethronement.

1821.

PAGE

v.

WILSON.

virtue of which, some process against the prior had, as the petition stated, been commenced in the Exchequer. *Christ Church Canterbury*, was one of the greater monasteries, and its possessions were surrendered to the crown, on the 24th February, 30 Henry 8. In March, in the same year, Henry the Eighth granted the manor of *Panfeld Priory*, to Sir Giles Capell in fee.

Evidence was entered into on both sides, with respect to the alleged custom for the exemption of hedges, the effect of which is stated in the judgment of the Court. There was also evidence of the nonpayment of tithe for the *Priory Woods*.

Mr. *Horne* and Mr. *Stephen* for the Plaintiff.

The evidence does not by any means support the alleged custom as to the hedges; it is proved that the southern division of the hundred of *Hinckford*, for which it is laid, is a district of recent origin. A custom *in non decimando* cannot be good for a parish, and supposing it could be laid for a district consisting of nineteen parishes only, it must be immemorial, which cannot be the case unless the district is equally immemorial. In *Mantell v. Paine* (a), a similar custom was laid for a parish, but the Court said there was no distinction between copses and hedgerows.

With respect to the *Priory Woods*, the evidence of non-payment of tithes is very loose, and it is not proved that these woods are identical with those formerly belonging to the monastery of *Christ Church*; the best evidence on this point would be the title deeds, which the Defendant has not produced. But if these facts were admitted, the material point to be proved would be, that at

(a) 4 Gwill 1504.

1621.

PAGE

v.

WILSON.

the time of the dissolution, the lands were held by the monastery of *Christ Church* lawfully discharged. *Hawking v. Gay.* (a) The Defendants allege that the lands were at that time discharged by prescription, for which purpose they ought to prove an immemorial possession in the monastery. *Clavill v. Oram.* (b) Here the lands, before the time of legal memory, were part of the possessions of the foreign monastery of *Caen*; they then came to the Crown, and having been granted to lay persons, passed from them to the monastery of *Christ Church*, which it is contended might have the benefit of a prescription enjoyed by the monks of *Caen*. But even if that monastery consisting of aliens, could be permitted to prescribe, the right must have been destroyed when the lands came into lay hands, and there can, therefore, be no prescription now. It is laid down by Lord *Hobart*, in *Wright v. Gerrard* (c), that prescription must be founded on the presumption of the land always having been in spiritual hands.

Mr. Heald, Mr. Treslove, and Mr. Blake for the Defendants.

The custom with respect to the hedgerows does not depend on the district being called the southern division of the hundred of *Hinckford*. Whether the division is modern or antient does not signify, if we prove the custom, and identify the lands over which it extends, and there is evidence enough to entitle us to an issue. The ancient pollards are not titheable, *Walton v. Pryor.* (d)

(a) *Bomb.* 37. 2 *Gwill.* 619.

(b) 4 *Gwill.* 1354. The *Master* of the *Rolls* remarked upon an inaccuracy attributed to the Court in this case, in stating that the unity was destroyed, by the lands being in lease at the time of the dissolution; the contrary having been decided in the previous case of *Cowley v. Keys*, 4 *Gwill.* 1308.

(c) *Hob.* 306. 4 *Gwill.* 575.

(d) 2 *Gwill.* 827.

1821.

PAGE
v.
WILSON.

With respect to the *Priory Woods*, they are not clearly identified with the possessions of the monks of *Caen*. The grant of *Henry* the First conveys "the wood" only, using the singular number; but in the grant of *Henry* the Eighth to Sir *Giles Capell*, there are the words, "*cum boschis et subboschis*," making it probable that the latter included something more; these woods may, therefore, have been the property of the monastery of *Christ Church* immemorially, which, with the evidence of non-payment, would establish the exemption. But if the identity of the woods with those of the alien priory were made out, it is clear that they might then have been discharged; for the monks of *Caen* being subjects of the king of *England*, were entitled to the same privileges. See *Calvin's case* (a), and *Bacon's* arguments on the case of the *post-nati*. If they could hold land, it would be singular if they could not enjoy an exemption; besides, the law of prescription, as a part of the canon law, extended over all the countries in the spiritual dominions of the pope.

In order to have the benefit of an exemption under the statute 31 *Hen.* 8., it is not necessary to shew in what manner the discharge originated. In *Nash v. Molins* (b), it was resolved to be sufficient to prove that the prior held the land discharged, "and if he held it discharged, *non refert* by what means, for it shall be intended by lawful means." So in *Priddle v. Napier* (c), and *Lamprey v. Rooke* (d), and in the Archbishop of *Canterbury's case* (e), where the effect of the statute is considered at large. But if the evidence of the previous title obliges us to go back to an earlier period than the dissolution, the difficulty arising from the land having been in lay hands is got rid of by the

(a) 7 Co. 1.

(b) *Cro. Eliz.* 206. 4 *Guill.* 162.(c) 11 Co. 14. b. 1 *Guill.* 248.(d) *Amb.* 291. 3 *Guill.* 859.(e) 2 Co. 42. 1 *Guill.* 189.

case of the Bishop of *Lincoln v. Cooper* (a), where lands discharged by prescription, being granted by the bishop to the Duke of *Somerset*, and afterwards re-granted, the prescription was held to be revived. This proves that the utmost effect of the land passing to a layman, is to suspend the exemption, and in this case it must have been revived by the grant to *Christ Church*.

1821.

PAGE
v.
WILSON.

In the Bishop of *Winchester's* case (b), it was held, that the tenant of the bishop might prescribe, and one of the reasons assigned was, that it would benefit the bishop by increasing the rent. Spiritual bodies would derive the same benefit from their alienees being able to prescribe. If they demised the lands for 1000 years, the prescription would continue; then why not if they aliened in fee? In *Slade v. Drake* (c), it is said, *arguendo*, that prescription goes to the assignee. According to Lord *Hobart*, in *Wright v. Gerrard*, the prescription is "inherent in the land, not a thing given, " but as a *non ens*," it would therefore pass with the land, whoever might become entitled.

This property was in the possession of the monks of *Caen* before the year 1200, about which time the decretal epistle of Pope *Innocent* the Third, put an end to arbitrary consecrations of tithes; they might have taken the tithes to themselves, which would then never become attached to the rectory, but would have continued vested in the monastery as a portion. There may have been a grant of the tithes of these lands by the parson, patron, and ordinary, previous to the 13th *Eliz*. If the discharge arose in either of these modes, it would not be destroyed by passing into lay hands.

(a) *Cro. Eliz.* 216. 1 *Leon.* 248. 1 *Gwill.* 165.

(b) 2 *Co.* 45. 1 *Gwill.* 167.

(c) *Hob.* 295. 1 *Gwill.* 385. See p. 400.

1821.

PAGE
2.
WILSON.

Mr. Horne in reply.

As to the right of the monks of *Caen* to prescribe, it is to be observed that, according to Lord *Coke*, profession in a foreign monastery did not work a civil death here (a): if the spiritual character was not recognised in the case of an individual, why should it confer a privilege on the body, who, residing abroad, could not perform the ecclesiastical services? But, if they ever had the right, it was destroyed by their suppression in the 2d of *Hen. 4*. It was a privilege which ceased when they could no longer enjoy it. The *dictum* cited from *Wright v. Gerrard* is contrary to the authorities; if prescriptive exemption were inherent in the land, it could never be lost or suspended. The doctrine is inconsistent with the case of the Bishop of *Lincoln v. Cooper*, for there it was admitted that when the Bishop granted to the Duke of *Somerset*, the prescription was gone. In that case it was held to revive, on the lands returning to the Bishop. The great distinction between that case and this is, that here the lands after being in lay hands, returned to an ecclesiastical body, different from that which formerly had the benefit of the prescription. Besides which, it is known that the Duke of *Somerset*, during his protectorate, was in the habit of seizing upon ecclesiastical property; and it is probable that he acquired the estate in question by some irregular means, and afterwards, when in disgrace, was compelled to restore it. If so, his possession would naturally be treated only as a temporary spoliation.

The MASTER of the ROLLS.

The case certainly involves a question of great importance, considering the great extent of the property

(a) *Co. Litt.* 152. b.

that may be affected by it: the lands of the monastic houses were of very great value; the alien priories alone were 96 in number (a), and it is said by *Matthew Paris*, that their possessions were equal to those of the King. Having bestowed considerable attention on the subject, and having arrived at a clear opinion on it, I will at once state what my impression is.

1821.

PAGE

a.

WILSON.

The case divides itself into two branches; one relating to the alleged custom, and the other to the right to prescribe. On both points the onus lies upon the Defendants; for it is now clear, whatever doubts may formerly have been entertained, that the tithe of wood is due by the common law as much as any other tithe; and the Plaintiff's title, as rector, to all the tithes in the parish, except those of hedgerows of less than a rod in width, and those of the *Priory Woods*, is admitted.

First, with respect to the custom to exempt the hedgerows, it is properly stated as a custom, and not a prescription. They state it as a local custom, by virtue of which all wood growing in hedgerows, not being of greater width than one rod, is exempt; and as they have laid the custom, it is not circumscribed with reference to the use of it, though they state, in the beginning of the answer, an exemption only for wood used for fencing and fuel. They lay the custom as extending over this and 19 other parishes, forming the southern division of the hundred of *Hinckford*, and they are a little incorrect in not also stating, that it has not been usual to pay these tithes in the nineteen other parishes. This custom, I think, they fail of supporting, either in point of law or in point of fact.

Not correct to plead, that by a custom used and approved in *P.*, and nineteen other parishes; no tithe of a particular kind was due or payable to the rector of *P.*

(c) See *Account of the Alien Priors*. London. J. Nicholls, 1779; in which the number is stated to have amounted to 146.

I should

1821.

PAGE
v.

WILSON.

I should observe also, independently of this, that there is some wood, to the tithe of which the Plaintiff is indisputably entitled; for it is proved that there is some wood growing in detached places, which therefore is not covered by any custom or prescription. It is also proved that there were some pollards cut; and they are not proved to be ancient pollards. In order to privilege them, it must also be proved that they are timber; by the general law of the land there are only three kinds of timber, oak, ash, and elm; other trees may be timber by custom, but no custom is proved here. Some of these pollards are stated to have been hornbeam, maple, and willow; they are not, therefore, comprehended in the description of wood protected from the general law of tithing: *Silva Cædua*; nor, if they were, is it proved that they had acquired the privilege by age. The Plaintiff is therefore clearly entitled to an account of them.

The circumstance of wood growing in hedgerows does not constitute any ground of exemption; it is not a new point; it has been raised before in nearly the same words as here, and with respect to hedges of the same width; but the answer has been, that if they can be protected, it can only be by special custom. In *Biggs v. Martin* (a) an account of the tithe of wood growing in hedgerows was decreed, the Defendant having insisted that it was not due. So in *Turner v. Weedon* (b), *Layfield v. Cowper* (c), and in *Mantell v. Paine* (d), where an exemption for hedgerows less than a rod in width was claimed, an account was decreed, the Court being of opinion that there was no distinction between coopes and hedgerows. Nor does the mode in which the wood is used, make it, by the general law, less subject to

(a) 2 *Gwill.* 542.(b) 1 *Wood*, 150. 2 *Gwill.* 124.(c) 1 *Wood*, 330.(d) 4 *Gwill.* 1504.

tithes. The leading case on this subject is *Walton v. Tyron* (a), where Lord *Hardwicke* took great pains to explain the nature of the tithe of wood; he there shews that being titheable as soon as it is felled, the use to which it is subsequently applied is of no consequence, except where there is a custom, which may make a difference.

1821.

PAGE

v.

WILSON.

Then, with respect to the custom, being a claim *in non decimando* by laymen, it is clear that it cannot prevail, except with this article, wood, and in that case it must also be proved for a known ascertained ancient district. (b) It has been decided to be good in the wealds of *Kent*, *Sussex*, and *Surrey*, which are known ancient and extensive districts; but it cannot be laid for a parish. It is confined also to wood; for when it was tried to be extended to agistment tithe throughout a hundred (c), the Court held that such a custom could not legally exist, saying, that though a custom *in non decimando* might prevail with articles titheable by custom only, yet it could not be set up to destroy a right given by the common law. I do not, however, concur in the view taken in that case of the nature of the tithe of wood, it not being a question now, whether tithe of wood is due of common right. An argument to prove the contrary is drawn from the petition of the Commons respecting the tithes of wood, in the 13th year of *Edward III.* The king's answer was: "Let it be done of this as it hath been done heretofore," clearly referring to an antecedent custom; and though wood differs from other titheable articles in not yielding annual profits, it is not the less titheable on that account.

(a) 2 *Gwill.* 827.(b) See *Nagle v. Edwards*, 3 *Anst.* 702. 4 *Gwill.* 1442.(c) *Hicks v. Woodson*, 4 *Mod.* 356. 2 *Gwill.* 550.

1821.

PAGE

v.

WILSON.

In this case the custom is not laid for any district that can be assimilated to the wealds, or even to a hundred; it is only a modern division of a hundred. The district ought also to be as ancient as the custom, or they could not be co-extensive; but it is proved by all the witnesses, that this division was made within the last fifty years, for the convenience of the magistrates in the administration of justice. This would be decisive even if the custom were proved, but the witnesses fail of establishing it. They all introduce their testimony, by saying that they are not acquainted with any such custom, and then go on to say, that they have never heard or known of any tithe of wood in hedges, or of the loppings or toppings of pollard having been paid. This may have happened from various causes; the evidence of such witnesses, being merely negative, is of no value, as is observed in 1 *Gwillim*, 360. There are also several witnesses who ought not strictly to have been examined. Some of them are farmers, and others clergymen within the district: one of the latter states an instance, in which he received tithe for wood, cut in a hedge of less than a rod in width, which is better evidence than any on the other side. The proper mode of proving such a custom would be by the evidence of persons who felled the wood and carried it away without paying; especially if that was coupled with a refusal to pay. But if the evidence were much stronger, it is a fatal objection, that the district does not comprehend a sufficient extent to legalize the custom; it cannot be, except for an ancient district not less than a county or a hundred. The reason of this rule is not so easily found, unless it be to render it less likely that such customs should be set up by fraudulent contrivances. It does not prevail as to tithes only, for no custom could be laid for a vill, without stating it to be an ancient vill. The authorities on this subject are to be found in *Hicks v. Woodson*, and

No custom in
non decimando,
can be good
except for
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trict, not less
than a county
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and in *Brooke's Abridgement*, and *Doctor and Student* there referred to. I think, therefore, that the Plaintiff is clearly entitled to an account of the wood cut in detached places, and of the pollards; and that the Defendants having failed in proving the existence of the custom, and the requisites to give it validity, there must be an account of the wood in hedgerows also. There is no contested question of fact, the custom as laid being such as no usage could support, and an issue is therefore quite unnecessary.

1821.

PAGE

v.

WILSON.

The other question is of more importance. I agree that the evidence of the identity of the lands is very loose, and the Defendants are bound to lend all the aid they can to make it out by the most satisfactory proof. It is not enough to shew that the monastery had *boschos et subboschos* in the parish; there ought to be some evidence of the quantity; it would otherwise be easy to extend the wood, and with it the exemption. But I think there are other circumstances, tending to shew, that these lands were included in the possessions of *Christ Church Canterbury*; for in their surrender to *Henry VIII.* and in his grant, their possessions in this parish are described as passing by the name of *Panfeld Priory*; and there is a great deal of evidence, to shew that the woods in question are called the *Priory Woods*, and are reputed to have belonged to the priory. This, coupled with evidence of immemorial non-payment of tithe, and the reputation of their having been exempt, forms a body of evidence in favour of the identity, though suspicion may be excited from the non-production of the title-deeds. But if the case turned upon that point, it would be a proper subject for an issue, there being fair evidence of the fact.

I will, therefore, assume it to be proved, that these sixty-eight acres formed part of the possessions of *Christ Church*

1821.
 PAGE
 v.
 WILSON.

Church Canterbury; and that being one of the greater monasteries, and one which existed before the time of legal memory, and there being proof of non-payment of tithe, the Defendant makes out a *prima facie* case of exemption, bringing himself within the stat. 31 Hen. 8. c. 13. s. 21., giving to the grantees of the crown the benefit of exemptions previously enjoyed by the monasteries, that being the only case in which a layman can prescribe *in non decimando*. The rector, however, undertakes to shew, that the lands were not immemorially in the possession of this spiritual house, and that it only came to them in 1472, about seventy years before their dissolution. Against this it is first argued, that the lands granted in 1472 do not correspond in extent, and are not proved to be the same with those which passed to *Henry VIII.*, and by his grant to Sir *Giles Capell*. But I think the evidence is quite sufficient to prove the identity; for in all the grants the property passes by the same denomination, of the manor of *Panfeld*; and can we suppose that there were two manors of the same name in the parish? If not, it is clear, that it was one and the same thing that passed by all these grants. And though in the grant of *Henry I.* the word *boschos* is used in the singular number, yet in all the others it is in the plural; the words are large enough to comprehend whatever belonged to *Panfield Priory*, and that appears to have been the subject of all these grants.

I have looked into a little book that contains an account of the alien priories (a), and also into *Tanner's Notitia* (b). It contains an account of the numerous possessions belonging to *Christ Church Canterbury*; but I do not find that they had any thing in *Panfield*, though

(a) *Account of the Alien Priors*, vol. i. p. 128. (b) *Kent*, 12.

they

they had in *Bocking*, prior to the grant in the 12th of *Edward IV.*, which is mentioned there, corresponding entirely with the Plaintiff's account. The first grant to the monks of *Caen* appears to have been by *Waleran Fitz Ralph*, and it is a mistake to suppose that it came to them in the time of *Henry I.*; for he, in his letters patent, acknowledges it to have been granted to them by his father *William*. This agrees with what is stated in the account of the alien priories, which mentions *Pansfeld* to have been given to the abbey of *St. Stephen* by *Waleran Fitz Ramulph*, in the 4th of *William the Conqueror*. However, I do not speak from this, but from the grant itself, from which this very material fact appears, — that in the time of *William* it belonged to a subject, and was given by him to the monastery. The title originates with him, and is thence traced downwards to *Wodehouse*, afterwards to *Griselda Hinde*, and ultimately to *Christ Church, Canterbury*.

1821.

PAGE
v.
WILSON.

The question, therefore, is not left to any presumptions; and we must inquire, whether, if a claim to tithes had been made while the property was in the possession of *Griselda Hinde*, or of *Wodehouse*, they could have made any defence to it. It is admitted, that laymen were by law incapable of having the pernancy of tithes or prescriptive exemption. Tithes were a spiritual property granted to spiritual persons for spiritual purposes, and the law forbade a grant of them to laymen; no usage could legalize it. This, however, is not a case upon the pernancy of tithes, or about a portion, but it is a case of exemption; and the answer to *Griselda Hinde* and *Wodehouse* would have been, that being lay persons they could not prescribe; they must have stated it to be derived originally from *Fitz Ralph*, and it follows, that even if the doctrine of *Hobart*, in *Wright v. Gerrard*, be law, it would not apply, for he puts the case of lands

1821.

PAGE

P

WILSON.

By the common law, all land equally charged with tithes; there can be no exemption inherent in the land.

having always been in spiritual hands: these first belonged to a layman, then came into spiritual hands, and then to lay persons again.

With respect to the doctrine of *Hobart*, it is in the first place merely *dictum*, not called for by the case, which was decided upon the unity of possession. It is besides contrary to the fundamental principles of the common law, by which all land is equally charged with tithes; to suppose a single acre not charged is quite a mistake. From the earliest periods tithes were every where due to somebody; even in extra-parochial places they are payable to the king. And although when in spiritual hands no tithes were paid, that was from the rule "*ecclesia decimas non solvit ecclesiæ*," and not, as he supposes, from any non-charge inherent in the land. The land was still liable, though the payment was suspended. This case was in 1620, but what Lord *Hobart* said in it seems to have had no effect at all upon the judges who decided *Sydow v. Holmes* (a), in 1722. This doctrine, however, could not, even if correct, confer any immunity from tithes upon these lands; they must have been subject to them at the time of the grant by *Fitz Ralph*. I observe also a very striking circumstance, that none of the grants purport to pass the tithes of these lands, although in the grant of *Henry I.*, where the grant of *Fitz Ralph* is recited, it is said to have included the tithes of his other lands.

These lands then being liable at the common law, could be exempt only by some of the modes that have been mentioned; real composition, bull, order, unity of possession, grant or prescription. If it was, as now stated, by prescription, still there must have been a

(a) *Cro. Car.* 422. *Sir W. Jones*, 568. 2 *Will.* 479.

grant,

grant, that is, a grant is presumed; and the Court is bound to presume that the grant was such as it ought to have been; that it was made to this spiritual body and their successors, for spiritual purposes, and so as not to enable them to aliene. If the grant was made otherwise, it was a transgression of the law, and would have led to great mischiefs, as by their alienations the church would be stripped, without any provision being left for the performance of the duty. It is on the general principle, that unless there be strong evidence against it, you must presume *omnia rite acta*, and not from any undue favour to the church, that the courts have always supposed such grants to be made; so that when the bodies were dissolved, they would not pass to the crown or its grantee. The annihilation of the alien priories put the exemptions of their possessions upon the same footing with those of the lesser abbies dissolved by the stat. 27 Hen. 8., and on which those of the greater abbies would also have stood, had it not been for the saving clause in the stat. 31 Hen. 8. The question relative to the possessions of the lesser abbies was much discussed in *Sydney* and *Holmes*, a case of great authority. *Croke*, who thought the lands continued to be exempt, did not put it upon the ground suggested by Lord *Hobart*, but argued, first, that the exemption ought to be presumed to have originated in a real composition. But if so, there must have been some equivalent given in return; the other judges, therefore, would not presume a composition, there being no evidence of it, but considered it to be a prescriptive exemption, which ceased at the dissolution of the abbey, or upon alienation to a layman. *Croke* then endeavoured to support his opinion upon the stat. 31 Hen. 8., by arguments, which, however, are quite contrary to all the subsequent authorities.

1821.

PAGE
v.
WILSON.

1821.

PAGE
v.
WILSON.

If, in the present case, the proof of the nonpayment be sufficient to raise the presumption of a prescriptive privilege in the spiritual body attaching on the land; it would be the same with respect to the lands belonging to all the alien priories, and the lesser abbies dissolved by the stat. 27 *Hen. 8.*, many of which enjoyed exemptions. What would there be to prevent them from attaching on the lands in the hands of the grantee? Yet it is well settled, that except where it was saved by the stat. 31 *Hen. 8.*, the dissolution of the body dissolves the exemption. That has hitherto been the law as to all this large mass of property; and to yield to the contrary arguments, would overturn the case of *Sydney v. Holmes*, and the other authorities which have ruled, that in these cases the Court must presume that species of exemption which would not have perpetuity in the hands of laymen.

If, then, at the time these lands belonged to lay persons, they could not have resisted a demand of tithes, the question will be, whether the right to prescribe could be revived. The case of the Bishop of *Lincoln v. Cooper (a)*, of which we have only a very imperfect account, is, I think, distinguishable from this. We know the suspicions that would attach upon a temporary transfer to the Duke of *Somerset*, and it might have been considered as an undue exercise of authority, leaving the right all along vested in the bishop. But supposing that the property was treated as having belonged to him, still it came back to the same body that previously held it before, and the decision was that the prescriptive right of the bishop, which protected it in his hands, did not cease altogether by its being parted with

(a) *Cro. El.* 216. 1 *Gwill.* 163.

For a time; the grant purporting to be a personal privilege, which might exist in the bishop. The principle of *Sydown v. Holmes* was, that when the body was dissolved, the privilege was gone; but in the case of the Bishop of *Lincoln*, the body continued the same. Tithe does not grow out of the land, but is a separate and distinct property; the right might have existed in the bishop, while the land belonged to the Duke of *Somerset*, and the land, therefore, might have become again discharged when it returned to its former owner. It was a question on the construction of the grant, whether the right was gone by the temporary loss of the land. The case of *Sydown v. Holmes*, decided about 45 years after this, comes expressly to the point, that the non-payment of tithe does not draw with it a presumption of such a durable exemption as would continue in the hands of a layman.

1821.
PAGE
v.
WILSON.

It is not necessary to enter into the consideration of the Bishop of *Winchester's* case, and the other cases turning either upon the unity of possession, or upon the question whether the exemption continued when the lands were not *in propriis manibus*. It was argued, that as it was more beneficial to the spiritual bodies to lease their lands tithe-free, they would derive similar benefit from being able to sell them with that privilege, but observe what mischiefs that would let in; they might become utterly impoverished by the sale of all their possessions. *Cowley v. Keys (a)*, and the other cases prove, that if the lands be leased, the privilege of order is suspended; but if it be absolutely parted with it is lost. The analogy subsists with respect to the crown; it has the privilege of prescribing, but in the hands of its grantee the lands became liable of

(a) 4 *Gwill.* 1308.

1821.

PAGE
v.
WILSON;

course; the courts do not presume that there was any durable exemption, but refer it to privilege only, which by the alienation is gone.

With all spiritual bodies, the privilege ceases when the body is dissolved. In the case of the Dean and Canons of *Windsor*(a), where "a prescription was shewed
" of a discharge of tithes in an abbot, prior, and
" convent, and that the corporation was afterwards
" dissolved, because all the monks died, and the abbot
" also; and it was holden by the Court, that he who
" is now owner of it, and holdeth the lands, shall pay
" tithes, for a layman cannot prescribe in *non deci-*
" *mando*; and the prescription continues no longer than
" 'the land continued in the abbot and convent's hands.'
This is precisely in point. In *Degge's Parson's Counsellor*, p. 332., it is laid down that if lands belonging to any of the lesser monasteries, and discharged by order, had been granted by the king to one of the greater monasteries, they would not retain the exemption, the right to tithe reverting to the parson immediately upon the dissolution; and the greater monastery would not, therefore, hold them discharged. There is a case of *Bolls v. Atkinson* (b), where the Abbot of *Abingdon* being seized of lands discharged by prescription, granted it to *All Souls College*. It was held that the discharge was gone, for it could not be intended to be a real composition, not being pleaded or found to be so, but that it was a mere prescription, and personal to the abbot, and did not run with the land.

Upon these principles and authorities the defence is completely negatived; and if there were any doubt remaining, I think the way in which it is pleaded is not

(a) *Godbolt*, 211.(b) 1 *Levinz*, 185. 1 *Sid.* 320.

sufficient.

sufficient. In general it is enough to say that at the time of the dissolution the abbey held it discharged by some mode or other: but here the prescription should have been pleaded in the monastery of *St. Stephen of Caen*; for as the case is circumstanced, the right is derived from that monastery, and not from that of *Christ Church*. You should say that the monastery of *St. Stephen* had the immemorial exemption, which subsisted imperishably till the dissolution. That should have been put upon the record. You cannot take the party by surprise; the specific title that is laid must be proved. You are not at liberty upon this statement to engraft a new case, admitting that *Christ Church* was not immemorially possessed, and claiming the exemption by virtue of the possession of another religious body.

1821.
PAGE
v.
WILSON.

We may also observe, that it is not very probable that there is really any such exemption. The grants comprise, besides these woods, other lands, meadows, and pastures, all of which have gone together. The woods, it is said, are now exempt, while all the rest, the more valuable parts of the property, are liable. This would be a singular exemption. All the property passed by the same grants, and by the same words; then if there had been this qualified exemption, would not the grants have mentioned, with respect to the woods, that they were not titheable?

In addition to this, there is a case of *Penfold v. Groome* directly in point; it is not reported, but I have procured my own brief in it, and the short-hand writer's note of the judgment. It was a suit, by a vicar, in the Exchequer. At first Mr. *Hollist*, the very experienced counsel who defended it, set up a defence under *Sion Abbey*, as one of the greater monasteries. On the part of the Plaintiff, we were able to negative that ground of

1821.

PAGE

v.

WILSON.

defence; by shewing that *Sion Abbey* did not exist from time immemorial. A very ingenious endeavour was then made to set up, in express terms, the same defence that is made here; they pleaded that the lands in question belonged to the abbey of *Fiscamp*, in *Normandy*, one of the alien priories, and were held by them exempt from tithes; and that, coming to the crown by the stat. 2 *Hen. 4.*, they were granted to *Sion Abbey*, without any intermediate possession by laymen. A question was made whether the Defendant had sufficiently identified the lands as being part of the possessions of the abbey of *Fiscamp*. Some evidence of it was produced from *Domesday Book*, and there was reason to believe that they might be able to establish it by some inquiries. The Court was divided in opinion; the Lord Chief Baron and Mr. Baron *Thompson* giving judgment for the Plaintiff, Mr. Baron *Graham* differing from them: Mr. Baron *Hotham* was absent. The Defendant dying, his representative appealed to the House of Lords, when the decree of the Exchequer was affirmed, excepting so far as it directed an account of the tithe of wood, as to which an issue was directed. The reason of that was, that the land was stated to be in the weald of *Sussex*; the great question was the tithe of hay. I had a recollection of it, and was gratified to find, on receiving the papers this evening, that it entirely coincides with the views I had formed. (a)

Reg. Lib. B. 1820. fo. 1175.

EXCHEQUER.

July 6. 1804.

Dom. Proc.

June 20. 1810.

Lands which were held discharged before time of memory, by one of the alien priories,

(a) PENFOLD v. GROOME.

The Plaintiff was vicar of *Steyning*, in *Sussex*, and the Defendant the occupier of a farm in that parish, called *Charlton Farm*. By his answer he stated, that the only part of his farm on which he had cut any wood was within the weald of *Sussex*, which from time immemorial had been exempt from payment of tithes of wood and underwood. He also stated that his farm and premises were long before, and at the time

of the dissolution of the late dissolved monastery of *Sion*, in *Middlesex*, (theretofore called the monastery of *St. Saviour*, and *St. Mary the Virgin*, and *St. Bridget of Sion*, of the order of *St. Augustine*,) parcel of the possessions of the said late dissolved monastery, being the demesnes of the manor of *Charlton*, in the county of *Sussex*, which belonged to the abbeſs and convent of the ſaid diſſolved monastery; and that the ſaid manor and lands, and the reſt of the poſſeſſions of the moſtatory of *Sion*, (the ſame being one of the greater moſtatories, and having poſſeſſions of upwards of 200*l.* per annum,) were given and ſurrendered unto, and came to the hands of King *Henry* the Eighth, under the act of the 31ſt of his reign, intituled “ An act for the diſſolution of moſtatories and abbies;” and that the ſaid manor of *Charlton*, with the appurtenances, (whereof the ſaid farm and premises, called *Charlton*, being demesnes as aforeſaid, were parcel,) was before, and in the firſt year of *Richard* the Firſt, and till the 2d of *Henry* the Fifth, part of the poſſeſſions of the then abbey of *Fiſcamp*, in *Normandy*; and that the ſaid manor with the appurtenances, and the reſt of the poſſeſſions of the ſaid abbey of *Fiſcamp*, came to King *Henry* the Fifth, by virtue of an act of the ſecond year of his reign; and that his ſaid Maſteſty, King *Henry* the Fifth, or King *Henry* the Sixth, or King *Edward* the Fourth, afterwards granted the ſaid manor with the appurtenances, (whereof *Charlton Farm* was parcel,) together with various other poſſeſſions of the ſaid abbey of *Fiſcamp*, unto the uſe of the ſaid abbeſs and convent of *Sion*; and that they held the ſame, and enjoyed the ſame, as parcels of their poſſeſſions, till the ſame were ſurrendered to King *Henry* the Eighth as aforeſaid. And he believed that the whole of the ſaid *Charlton Farm* (being demesnes as aforeſaid) was from time whereof, &c., held and enjoyed by the ſaid abbey of *Fiſcamp*, and the ſaid King *Henry* the Fifth, or by him and his ſaid two immediate ſucceſſors, or by him and King *Henry* the Sixth, and by the ſaid abbeſs and convent of *Sion*, from the time the ſame were granted to them, or by their tenants, and by all other perſons in whoſe occupation the ſame were, exempt and diſcharged, acquitted and privileged, of and from the payment of all tithes whatſoever ariſing or growing upon the ſame, and every part thereof; and by means thereof, and by force

1821.

PAGE
v.
WILSON.
—
Penfold
v.
Groome.
—

and coming to the crown on their ſuppreſſion, were granted to one of the greater moſtatories, in whoſe hands they remained till the diſſolution, are no longer exempt.

1821.

PAGE

v.

WILSON.

Penfold

v.

Groome.

Lands held discharged from tithes before time of memory, by one of the alien priories, coming to the crown on their suppression, are no longer exempt.

force of the same act, the said farm had ever since been, and then was, exempt and discharged from the payment of all tithes whatsoever.

The Lord Chief Baron, in giving judgment, remarked, that the stat. 2 Hen. 5., for suppressing the alien priories, had not the words "in as large and ample manner," &c., still less the words of the stat. 31 Hen. 8.; and that the non-payment of tithes for land alleged to have come from ecclesiastical hands, was to be ascribed to a privilege that must die with them. He cited the Dean and Canon of *Windsor's* case (a), *Sydow v. Holmes* (b), *Bolls v. Atkinson* (c), and *Dege*, 892., and observed that in *Sydow v. Holmes*, *Crake* agreed that a prescription of this kind, coming from an ecclesiastical corporation to a layman, should not be preserved without an act of parliament; but he conceived it to be a real composition. Now in the stat. of Hen. 5. there were no words to preserve the privileges, unless their coming into his possession was sufficient for that purpose; and with regard to that, even the stat. of 27 Hen. 8. was not found to be sufficient for the purpose of supporting the privilege of the lesser monasteries. It was thought to require words as strong as those in the stat. 31 Hen. 8. It was not a composition real. It was to be presumed that the privilege given to the corporation died with the corporation, and though it came to the hands of the crown, still those privileges were lost in the way there.

Mr. Baron Thompson thought the lands were not identified with those of the abbey of *Flecamp*; but if they were, he agreed that the privilege was totally taken away when the land ceased to belong to it. The statute of *Henry* the Fifth operated in the same way as that of 27 Hen. 8., for the dissolution of the lesser monasteries; in which case it was admitted that every privilege, whether by prescription or otherwise, was actually gone by their dissolution; and after the lands went to the crown, those exemptions did not exist in the hands of the crown, and consequently were not granted.

Mr. Baron Graham thought the identity of the lands was a question for the consideration of a jury. After observing that the stat. 2 Hen. 5. was different from that of 27 Hen. 8.,

(a) *Godk.* 211(b) *Ut. sup.*(c) 1 *Lev.* 185. 1 *Sid.* 336.

He said he thought it probable those tithes never were in charge to the rectory, but were enjoyed as distinct property. The land would be exempt into whatever hands it came, that is to say, while in the hands of persons able to sustain the plea of absolute discharge of tithe; for it had passed all along to persons competent to prescribe *in non decimando*. He also thought that if the lands were not part of the possessions of the abbey of *Fiscamp*, the immemorial non-payment was only to be explained by ascribing it to an adverse right; the crown might have had a title to these tithes, and every presumption was to be raised from the fact, which might be taken for granted that the crown never did pay tithes to the rector. He cited *Slade v. Drake* (a), and *Lamprey v. Rooke*. (b)

It was stated that Mr. Baron *Hotham*, who was absent, concurred in opinion with the Lord Chief Baron and Mr. Baron *Thompson*.

The decree directed an account of small tithes generally. The printed cases, upon the appeal to the House of Lords, are to be found in the collection in the *Lin. Inn Library*, vol. v. p. 456. In the reasons for the appellant's case, which are signed by Sir *A. Piggott*, Mr. *Hollist*, and Mr. *Wetherell*, the circumstance of the land having always been in spiritual hands, is relied on; and the cases of *Wood v. Bulstrode* (c), and *Tate v. Skelton* (d), and *Walklate v. Wilshaw* (e), are cited. A case of *St. Amand v. Parker* is alluded to, where a prescription in the abbess and convent of *Sion* was set up, but disallowed, the abbey being founded within time of memory. The respondent's case is signed by Sir *T. Plumer* and Sir *Samuel Romilly*. The decree was affirmed with the variation mentioned in the text.

1821.
PAGE
v.
WILSON.
Penfold
v.
Grooms.

- (a) *Hob.* 225. 1 *Guill.* 385. (b) *Amb.* 291. 3 *Guill.* 859.
(c) 2 *Wood*, 289. (d) 4 *Wood*, 550. 4 *Guill.* 1503.
(e) *Degge*, 326.

1821.

ROLLS.
Feb. 15.
March 15.

COPE v. PARRY.

(Before the *Lord Chief Baron* and Masters *Stephen* and *Courtenay*, for the *Master of the Rolls*.)

In a bill to compel the performance of a covenant of a covenant to surrender a copyhold estate to *A.*, in trust for others, *A.* must be a party.

W. COPE, in his marriage-settlement, covenanted with *Jones*, a trustee, to surrender to him a copyhold estate, to hold to the uses of the settlement. *Cope* being dead, the bill was filed by the persons interested under the settlement, against the Defendant, who had purchased the estate, as it was stated, with notice, to compel a performance of the covenant.

Mr. Benyon and *Mr. Gardner*, for the Defendant, objected that *Jones*, the trustee, ought to have been made a party. They cited *Attorney General v. Green* (a) and *Cooke v. Cooke* (b), where it was held that in a bill for the specific performance of a covenant entered into with *A.* in trust for *B.*, *A.* must be a party.

Mr. Heald and *Mr. Parker*, for the Plaintiffs.

The *Lord Chief Baron* said, that the effect of the surrender, if the Court decreed it, would be to give *Jones* the legal estate. He ought, therefore, to be a party; otherwise another suit might become necessary against him. (c)

March 15.
A person examined as a

Jones was made a Defendant, and the cause came on again before the *Master of the Rolls*. *Jones* had been pre-

(a) 2 Bro. C. C. 492.

(b) 2 Vern. 36.

(c) See *Head v. Ld. Teynham*, 1 Cox, 57. *Wood v. Williams*, 4 Med. 136.

viously examined as a witness for the Plaintiffs, and an objection was now made to the reading of his evidence, on the ground of his being a party in the cause, and there having been no order to examine him.

1821.

COPE
v.
PARRY.

The *Master of the Rolls* over-ruled the objection. *Jones* was not interested in the subject of the suit, or in the costs, as whatever the result might be, his costs must be paid. There could be no occasion for an order, as he was not a party at the time of his examination; nor could it then be known that he would become a party afterwards. (a)

witness for the Plaintiff, being afterwards made a defendant, and not being interested in the suit, his evidence may be read.

(a) See *Wy. Pr. Reg.* 420., where it is laid down that a person being examined as a witness, and afterwards made a defendant, his deposition cannot be read, although he be only a trustee.

OSBALDISTON v. ASKEW.

Jan. 15.

THIS was a suit for the specific performance of an agreement made in the year 1812, for the purchase of an estate of about 70 acres of land. In *July* 1818, there had been a reference of the title. In the course of the suit, a person of the name of *Gait* laid claim to a part of the estate, consisting of about eleven acres, and filed a bill for the recovery of it, against the Plaintiffs in this suit, the vendors. A plea was put in, which, upon argument before the Vice Chancellor, was overruled. The Plaintiffs in this suit appealed from the order overruling the plea, and they now moved that the Master's report on the title might be suspended till after the hearing of the appeal, or that the Master might be at liberty to report specially. It was stated by affidavit, that all the objections to the title were removed, except that

The Master's report on a reference of title, will not be suspended, to wait the decision of a suit commenced against the vendor for the recovery of part of the estate, but the two suits may be heard together.

1821.

OSBALDISTON

v.

ASKEW.

that arising from the pendency of the suit of *Gait v. Osbaldiston*.

Mr. Horne, in support of the motion.

Mr. Wetherell and *Mr. Roupell* against it, argued, that, though there might be cases where the report would be suspended, that some act necessary to complete the title, and within the power of the parties, might be performed, yet the same principle would not apply where the title depended on litigation, the end of which could not be foreseen: besides the delay that had already taken place, the purchaser would have to wait indefinitely the hearing of the appeal, and perhaps of a future appeal to the House of Lords.

The LORD CHANCELLOR.

The circumstance that this contract was made several years ago, does not, in my view of the case, make any difference. For the state of it is this: the Master is about to make his report; if it is in favour of the title, the contract must be performed: if not, you may take exceptions, and bring them before the Court. It seems the subject of the contract is an estate of about 70 acres; and if there is a defect in the title to eleven, it will probably be material to the suit. Whether the Master has or has not had before him what has passed in the Vice Chancellor's Court, I do not know. But if he has taken notice of it, it will come before the Court as legitimately as it was brought before him; and if it was not brought before him, he would not pay any attention to it. The proper way, I think, will be, for the Master to make his report; then that you should take an exception; and that I should hear the exception and the plea together; and then if, as has been suggested, there should be an appeal to the House of Lords, the two causes may go there together.

1821.

THE EARL OF STRATHMORE v. THE COUNTESS
OF STRATHMORE.

Feb. 27.

THE Right Honourable *John Bowes*, late Earl of *Strathmore*, by his will, dated in *June*, 1817, devised his real estates in *England* to trustees, for a term of 1000 years, and subject thereto to the use of the Plaintiff, (by the name of his son, or reputed son,) *John Bowes*, by which name he was baptised in *June* 1811, for his life, with remainder to his first and other sons, in tail male, with other remainders over, and an ultimate limitation to his own right heirs. After bequeathing some chattels to go as heir-looms, and giving several legacies and annuities, he directed the residue of his personal property to be laid out in lands, to be settled to the same uses to which he had devised his real estates. He appointed his trustees guardians to the Plaintiff.

The bill stated that the testator was the father, and *Mary Milner* (now Countess of *Strathmore*) the mother of the Plaintiff, and that on or about the 2d of *July* 1820, the testator intermarried with the said *Mary Milner*; that he afterwards re-executed his will, and added a codicil to it; and died on the 3d of the same month of *July*, leaving the Plaintiff, his only son, and heir at law according to the law of *Scotland*, and the Defendant, *Thomas Bowes*, his only surviving brother, and heir at law according to the law of *England*. The suit was instituted for the purpose of establishing the will and for taking the usual accounts.

The bill alleged that the testamentary appointment of guardians to the Plaintiff was invalid, and that a

Plea to a bill by a person suing as Earl of *S.*, (the earldom being a *Scotch* dignity,) that he is not Earl of *S.*, but that the Defendant is Earl of *S.* and *K.*, and averring that the Plaintiff is the natural son of the late Earl of *S.* and *K.*, and *M. M.*, who were resident and domiciled in *England* at the time of his birth, and were not married until several years after, overruled: there being no averment, either that the title of *S.* and *K.* was the same as that of *S.*, or that the Plaintiff was born in *England*.

Whether the plea should conclude in bar or abatement. *Qu.*

Whether the Court of Chancery, for the purpose of deciding on

the plea, has jurisdiction to determine to which party the dignity belongs. *Qu.*
guardian

1821.

The Earl of
STRATHMOREv.
Countess of
STRATHMORE.

guardian or guardians ought to be appointed for him by the Court. It charged, that by the marriage of the Plaintiff's parents, he was legitimated by the law of *Scotland*, and that he, therefore, had right to the title and dignity of Earl of *Strathmore*, and to the testator's other *Scotch* titles, dignities and honors, and also to divers baronies, lands and hereditaments, situate in *Scotland*, of which the testator was possessed at the time of his death; but that the Defendant, *Thomas Bowes*, disputed his right to the title, and that he and his son, *T. G. Bowes*, alleged themselves to be entitled to the estates in *Scotland*. It also charged, that the persons to be appointed his guardians ought to be directed to take all proper steps to establish his right to the title of *Strathmore*, and the other *Scotch* titles.

The Defendant, described in the bill as the Honourable *Thomas Bowes*, appeared by the name of the Right Honourable *Thomas Bowes*, Earl of *Strathmore* and *Kinghorn*, and pleaded in bar, that the Plaintiff, who in the bill was called and described by the name, style, and title of the Right Honourable *John Bowes*, Earl of *Strathmore*, was not in law Earl of *Strathmore*, nor entitled to assume and use the style and dignity of Earl of *Strathmore*; and that the Defendant, who in the said bill was impleaded and sued by the names and description of the Honourable *Thomas Bowes*, was in law Earl of *Strathmore* and *Kinghorn*, and that the Defendant alone was entitled to take and use the name, style, and title of Earl of *Strathmore* and *Kinghorn*, and ought to be impleaded and sued by that name, style, title, and dignity.

The plea then averred, in substance; that *John Bowes*, theretofore Earl of *Strathmore* and *Kinghorn*, who was seised of the earldom to him and the heirs male of his body, died in 1776, leaving *John Bowes*, his eldest son, and heir-

heir male of his body, and *George Bowes*, his second son, and the Defendant *Thomas*, his third son, and no other issue male of his body; that thereupon the said *John Bowes*, the son, became entitled to the earldom, and enjoyed it until the time of his death, which happened on the 3d day of *July* 1820; that by letters patent bearing date the 7th day of *August* 1815, the said *John Bowes*, last Earl of *Strathmore* and *Kinghorn*, was created a Baron of the United Kingdom by the title of Baron *Bowes* of *Streathlam Castle*, in the county of *Durham*, and of *Lunedale*, in the county of *York*, to hold to him and the heirs male of his body, lawfully begotten, and to be begotten for ever; that the said *George Bowes*, second son of the first-named *John Bowes*, Earl of *Strathmore* and *Kinghorn*, departed this life, without issue surviving him, in the lifetime of his eldest brother, the said *John Bowes*; that the said *John Bowes*, last Earl of *Strathmore* and *Kinghorn*, and Baron *Bowes*, died, as aforesaid, on the 3d day of *July* 1820, and that he died without issue male of his body lawfully begotten; that the Plaintiff *John Bowes Millner* was born of the body of *Mary Millner*, now calling herself Countess Dowager of *Strathmore* (then *Mary Millner*, spinster,) and that at the time of the birth of the Plaintiff the said last-named *John Bowes*, Earl of *Strathmore* and *Kinghorn*, Baron *Bowes*, was unmarried, and the said *Mary Millner* (now calling herself Countess Dowager of *Strathmore*) was, at the time, also a single woman and unmarried; and that the said *John Bowes*, last Earl of *Strathmore* and *Kinghorn*, Baron *Bowes*, and the said *Mary Millner*, before and at the time of the said Plaintiff's birth, were natural-born subjects of the king, resident and domiciled in *England*; and the said *John Bowes*, Earl of *Strathmore* and *Kinghorn*, Baron *Bowes*, was a peer of the United Kingdom of *Great Britain* and *Ireland*; and that the Plaintiff, *John Bowes*

1821.

The Earl of
STRATHMORE
v.
Countess of
STRATHMORE.

1821.
 The Earl of
 STRATHMORE
 &
 Countess of
 STRATHMORE.

Millner, was, at his birth, a bastard, and was and is thereby incapable in law of inheriting the title, style, and dignity, of Earl of *Strathmore* and *Kinghorn*, as heir male of the body of the said *John Bowes*, last Earl of *Strathmore* and *Kinghorn*, Baron *Bowes*; and that the said *John Bowes*, last Earl of *Strathmore* and *Kinghorn*, Baron *Bowes*, died, as aforesaid, on the said 3d day of *July* 1820, without lawful issue of his body, leaving the Defendant, his brother and heir at law; and thereupon the Defendant became heir at law and heir male of the body of the said *John Bowes*, the father, and first-named Earl of *Strathmore* and *Kinghorn*, and the title and dignity of Earl of *Strathmore* and *Kinghorn* descended upon and came to the Defendant; and that he, the Defendant, alone now is in law entitled to take and assume the same. The plea concluded thus: "And
 " the Defendant doth plead the matters aforesaid in bar
 " to the said bill so filed and instituted by or on behalf
 " of the said Plaintiff, by the name, title, and style of
 " Earl of *Strathmore*, against this Defendant, by the
 " name and description of the Honourable *Thomas*
 " *Bowes*. All which matters and things this Defend-
 " ant doth aver to be true, and he pleads the same in
 " bar to the said bill, and humbly," &c.

Mr. *Hart*, Mr. *Horne*, and Mr. *Shadwell*, in support of the plea.

There are two questions upon this plea. 1st, Whether the facts constitute a competent defence? and, 2dly, Whether the form of pleading them is regular? The first and only question on the merits is, whether the natural child of a *Scotch* peer domiciled in *England*, and cohabiting with an *English* woman, is capable by law of inheriting a *Scotch* dignity by the subsequent marriage of his parents. If the title had been an *English* one there could have been no doubt he would not have been entitled; this

was

was decided by the Barons at the Parliament held in the 20th Hen. 3. (a) In *Patrick v. Sheddon*, decided in the House of Lords in 1809, it was held that a person born in *America*, the son of a *Scotchman* by birth, but then resident in *America*, and who afterwards married the mother, was not entitled to inherit an estate in *Scotland*. That case cannot be distinguished from the present. It is suggested that the Plaintiff might possibly be entitled to the *Scotch* earldom, but not to the *Scotch* estates; the title to a dignity is governed by the same rules as inheritances in land, and the plea avers that the parties were both resident and domiciled in *England*. This species of plea is recognized by Lord *Redesdale*. (a) With respect to form, there is no distinction in equity between pleas in bar and abatement; they are always pleaded in bar to the whole or such parts of the bill as they apply to; in the case of a plea that the Plaintiff suing as administrator is not administrator, it always concludes in bar.

1821.
The Earl of
STRATHMORE
v.
Countess of
STRATHMORE.

When a question of this sort arises, the Court has jurisdiction to decide it. If the Defendant is the Earl, he is entitled to a letter missive, and is not bound to appear on being served with a subpœna; and almost every proceeding in the cause would vary according to the fact. It is said that the bill merely seeks an account of the estates, and that the question of title only arises incidentally. There is an express charge that the Plaintiff is legitimate, and is entitled to the *Scotch* property and dignities, and that steps ought to be taken to protect his right to them; he tenders this issue himself, and submits the question to the Court. If the plea is defective, the Court will allow it to be amended, as scarcely any step can be taken without raising the question.

(a) *Co. Litt.* 245. a.

(b) *Tr.* 3d ed. 187.

1821.

The Earl of
STRATHMORE
v.
Countess of
STRATHMORE.

In the course of the argument in support of the plea, the Lord Chancellor made the following observations. — The Plaintiff only sues as Lord *Strathmore*; the plea contains no allegation, either that the title of *Strathmore* and *Kinghorn* is the same as that of *Strathmore*, or that the Plaintiff was born in *England*; there is an allegation that his parents were domiciled in *England*, which might be, although he was born in *Scotland*. Should not the plea have averred, that the law of *England* affected their state and condition? The effect of birth in *Scotland* in the *American* case was altogether reserved. There are several very singular decisions with respect to *Scotch* marriages; in one case, where a party went from *England* and remained in *Scotland* for a short time, it was held that he had given up his former domicile, but had not acquired a new one, and therefore that it was sufficient if he was married according to the law of the Christian church. In this case the party was afterwards created an *English* peer. Where a *Scotch* peer is one of the sixteen representative peers, a question might arise how far his residence here would alter his character, and the effect of the late Lord *Strathmore's* residence in *Durham* ought to be considered. The distinctions on this subject are very refined; the House of Lords has held, that if a man goes to the *East Indies* in His Majesty's service, he continues a *Scotchman*, although he resides there; but that if he goes out in the Company's service, it alters his domicile, and he gets into the province of *Canterbury*. Suppose one of the members for *Yorkshire* were to die intestate in *London*, would he die intestate in *Canterbury* or *York*, being resident here for parliamentary purposes? With respect to a *Scotch* peer, it will be necessary to consider what the law would have been prior to the Union, when he was under an obligation to attend the parliament

ment in *Scotland*, and also what would have been the effect of occasional residence in *England* on his *Scotch* character, and on his state and condition as a *Scotchman*, and then what alteration has been created in consequence of the Union. If the House of Lords will allow me to decide this question here, it must be after great research on the subject. Has it ever been determined that marriage would legitimate a child in one country and not in another? I do not know whether I may not have been guilty of a breach of privilege in some of the orders which I have made. (a) Perhaps I could not call upon the Defendant to answer upon service of a subpoena only, without directing an enquiry somewhere. There is already a petition before the House of Lords from one of these parties; the question had better be determined there before this suit goes on. The other party can also present a petition. Without, however, entering into the question of jurisdiction, this plea, without more averment, cannot, I think, be sustained.

1821.
The Earl of
STRATHMORE
&
COUNTESS OF
STRATHMORE.

The *Attorney General*, Mr. *Wingfield*, Mr. *Abercrombie*, Mr. *Pepys*, and Mr. *Bickersteth* were to have argued against the plea. It was understood, however, that the plea was overruled without prejudice to any of the questions which had been raised, and which were very briefly discussed. (b)

(a) His Lordship on a former occasion had directed orders, in which the Plaintiff was named, to be drawn up thus:—*John Bowes*, styling himself Earl of *Strathmore*.

(b) The right of the parties to the earldom was afterwards argued at great length in the House of Lords, before a Committee of Privileges, both by Scotch and English counsel, and the question was decided in favour of the Defendant.

1821.

The Earl of
STRATHMORE

v.

Countess of
STRATHMORE.

His Lordship (without entering into the question of jurisdiction) doth declare that the said plea cannot be sustained with its present averments.

Reg. Lib. A. 1820. fo. 732.

Feb. 24. 27.
March 6.*Ex parte* WHITCHURCH, in the Matter of ROOD.

A mortgagee may petition to stay a bankrupt's certificate.

The circumstance of his not having tendered any proof till the third meeting, will not prevent him from presenting such a petition.

Where the amount of the mortgage debt was disputed, the certificate was lodged in the bankrupt office, till it should be ascertained.

THIS was a petition to stay the bankrupt's certificate.

The commission issued on the 15th of *June* 1820. On the 16th of *August*, being the third meeting, the petitioner, who was a creditor by mortgage, applied to prove his debt, and to have the mortgaged premises sold; on the 16th of *August*, at another meeting, his account was examined, and his claim, which was for 19,975*l.*, was admitted to the extent of 17,000*l.*, to be augmented, if the bankrupt should not substantiate against him a demand of about 3000*l.* The petition stated, that the value of the mortgaged premises would not be sufficient to cover the petitioner's debt, and prayed, that till the amount could be ascertained, the certificate, which had been signed by three fifths of the other creditors, and the commissioners, might be stayed. The petition having been dismissed with costs by his Honour the Vice Chancellor (a), was now reheard upon appeal to the Lord Chancellor.

It appeared by the affidavits, that the bankrupt and the petitioner had been in partnership together with three other persons, as brewers, until the year 1811, when the partnership was dissolved, as the bankrupt stated, without his consent. In the beginning of the

(a) 1 *Glyn & Jam.* 71.

year 1819, the bankrupt had made a claim upon the petitioner for a share of the subsequent profits of the trade, and had filed a bill against him for an account; he afterwards, with a view, as he stated, of compelling a speedy settlement, drew some bills of exchange in his own name on the partnership firm of *Whitchurch and Company*, and accepted them as a partner in that firm; upon this the petitioner procured an injunction to restrain him from using the partnership name; and subsequently, and after the bankruptcy, caused him to be apprehended on a charge of forgery, when he was committed for trial, but afterwards admitted to bail by the Court of King's Bench.

1821.

Ex parte
WHITCHURCH

The assignees had commenced an action against the petitioner, to contest the validity of some of his securities; at the trial of which they desired to examine the bankrupt as a witness. The amount of the petitioner's debt, after deducting the value of the mortgaged premises, was sufficient to turn the certificate.

Mr. *Cullen* and Mr. *Montagu* for the petitioner. The Vice Chancellor intimated, independently of the particular circumstances of this case, that a mortgagee could not apply to stay a certificate. This principle cannot be sustained; he cannot be distinguished from other creditors; the stat. 5 G. 2. c. 30. s.10. confers the privilege on all creditors without distinction; and Lord *Hardwicke* has held, that the words are to be construed as meaning creditors who show a reasonable ground for a claim, *ex parte Williamson*. (a) This case, and two others referred to in *Atkins*, were decided

(a) 1 Atk. 83. See *ex parte Ramsbotham*, and other cases referred to in *Co. B. L.*, 7 ed., p. 442, 443.

1821.

Esparte

WHITCHURCH.

on special circumstances, but support the general principle.

Mr. *Rose*, on the other side, contended, that a creditor by mortgage, standing originally with an interest adverse to the commission, though admitted by a special indulgence to receive dividend on the difference between his debt and the value of his pledge, was not entitled to the general rights of a creditor; the legislature could not have intended to place him in this respect on the same footing as creditors who have duly proved. He could not vote in the choice of assignees; and though the petition had stood over, when before the *Vice Chancellor*, in order to search for precedents, no instance had been found of a mortgagee interfering with the certificate. Besides this, the delay of the petitioner, in not going before the commissioners till the third meeting, and not being then prepared to ascertain the balance of his account, ought in this instance to exclude him from interposing further obstacles to the allowance of the certificate: it was on this latter ground that the *Vice Chancellor* decided.

The LORD CHANCELLOR.

If the case is to be decided on the special circumstances, it will not be of much consequence; but if it is to be determined on general principles, the question is one of great importance. Upon general principles, when not affected by special circumstances, I should think the third meeting not too late for the mortgagee to apply; for he has to consider first what his pledge will produce, and what claim he has beyond that; and up to that time, he probably cannot know, whether his opposition to the certificate will be worth any thing. No one ever intended better than Lord *Rosslyn* did when he

made the general order; he meant it to diminish the business in bankruptcy, but it has in fact increased it. Generally speaking, the mortgagee has very little to do with proof under the commission; because, in ordinary cases, his pledge is worth more than his debt, and he is therefore pretty sure of being satisfied; but I have been misled by a general impression, if there have not been cases where mortgagees have petitioned to stay the certificate. When a party has a mortgage for present and future debts, and to protect him from the payment of bills, and the state of the account is known to neither party, or where it is admitted that the pledge will be insufficient, I am mistaken if Lord *Thurlow* has not said, that he might petition for this purpose.

1821.

Ex parte
WHITTECHURCH.

The *Lord Chancellor* desired the book of the secretary of bankrupts to be searched, to see if there were any cases in which mortgagees had interfered with respect to the certificate. If no case could be found, he should say, that it appeared to him, that there might be cases where he should be allowed to interfere, and there might be others, where it ought not to be permitted. But he could not charge the petitioner with laches for not coming till the third meeting; for, till he saw what was the amount of the proof made, he could not know whether his interposition with respect to the certificate could be of any use to him.

Feb. 27.

Several orders were afterwards found, made in cases in which mortgagees had petitioned with respect to the certificate. (a)

(a) See 1 *Gl. & Jam.* 75.

1821.

*The LORD CHANCELLOR.**Esparte*
*WHITCHURCH.**March 6.*

I have had a difficulty in finding what is the state of the account now appearing on the proceedings under the bankruptcy: it seems, there is not any thing on the proceedings to question the petitioner's debt; and it strikes me that the state of the demand ought in some way or other to be ascertained in the bankruptcy; and that it is not fair, that while the petitioner stands a creditor for a large amount upon the proceedings, the assignees should be contending with him at law; and having got the bankrupt his certificate, have him examined as their witness. Much consideration is certainly due to the bankrupt; and when I state it as my opinion, that the mortgagee may have something to do with the certificate when the amount of his debt is ascertained, it would be doing injustice not to give the bankrupt an opportunity of shewing that he has called in question the amount of the debt; but, as the case now stands, there is a proof upon the proceedings without any allegation against it. I think the certificate should not go into the world: it should be lodged in the office, and it may have effect from the present time if the bankrupt should make out his case. Let the trial stand over till the next assizes; and the bankrupt may in the mean time shew any thing upon the proceedings, impeaching the amount of the petitioner's debt, or he may go before the commissioners and state any thing material against it.

1821.

ANONYMOUS.

Feb. 27.
March 10.

MR. AGAR moved that the six clerk might be directed to receive the answer of the Defendants ; it had been taken by commission, and was the joint answer of an infant Defendant, and of his mother, who was also a Defendant, and was his guardian ; it was signed by her, but the six clerk conceived it to be necessary, that she should sign it again as guardian to the infant.

The guardian of an infant defendant, being a co-defendant, and putting in a joint answer, need only sign it once.

The Lord Chancellor, — If there has been a practice that the party should sign twice, it ought not to be disturbed ; but one signature I should have thought was sufficient.

The LORD CHANCELLOR.

I have sent for the answer, and have seen the commission and certificate ; the registrars are of opinion that it may be received ; and it struck me, that, considering the nature of the caption, and that it was certified to be the answer of the Defendant for herself, and as guardian, there was sufficient to make it the answer in both capacities.

March 10.

ROWE v. WOOD.

1822.

March 10. 12.
17. 20. 22.

AFTER the plea in this cause had been over-ruled (a), and the answer of the Defendants had been put in, Motion for the appointment of a receiver upon a mortgagee of mines, who had become a partner by purchasing shares in them, upon the ground of mismanagement, and excluding the mortgagor from interference, refused ; the parties having regulated their rights by subsequent agreement, and the mortgagee not admitting that his mortgage was satisfied.

The rights and duties of a person in that situation not to be governed solely by principles applicable to one who stands simply in the character of a mortgagee or partner.

Mortgagee in possession of mines not bound to expend more than a prudent owner. If he can be deprived of the possession on the ground of mismanagement, it must be of a clear and specified nature.

(a) Vol. i. p. 315.

Howell } 22nd Feb
Howell } - 482 -
Bentley / 4 York
Butler / 187 -

1822.

Rowe
v.
Wood.

the Plaintiff filed a supplemental bill, praying that the agreements of *May* 1818, and *March* 1819 (a), might be set aside, and that a receiver of the mines might be appointed.

A motion for a receiver was now made. The Plaintiff stated that the accounts were improperly kept, and the mines injured by mismanagement; that they would be much improved, and the produce greatly increased, by judicious expenditure and working, and that he was altogether excluded from the superintendence of them. He also complained, that no satisfactory account had been given in the answer of the bills issued in the name of the *Crinnis Mine Company*, to which he still continued liable; and insisted that the debt due to *M. Wood* had been discharged, which was attempted to be shewn by affidavits contesting the justice of several items in the accounts. On the part of the Defendants, the *Woods*, the allegations of misconduct and mismanagement were denied; they contended that a considerable balance was due upon the mortgage account; and it was stated that the *Crinnis* bills had never been presented to *Rowe* for payment, or been brought into the mine accounts.

The *Attorney General*, *Mr. Horne*, *Mr. Shadwell*, and *Mr. Knight*, for the Plaintiff.

Mr. Heald, *Mr. Sugden*, and *Mr. Sidebottom*, for the Defendants.

THE LORD CHANCELLOR.

The great difficulty which I feel arises from not seeing upon what principle I am to interfere, in the present stage of the proceedings, to deprive the Defendant of the possession of the mine, not only as mortgagee

(a) Vol. i. p. 323. 340.

but as partner; and where I must assume, that the agreements stated in the pleadings are binding until they have been set aside.

1822.
Rowe
v.
Wood.

Mr. *Beckford* was mortgagee of a *West India* estate, which may be represented to be in some degree like a trade; and is, in that respect, similar to a mine. In the case of *Rose v. Nixon (a)*, before Lord *Hardwicke*, in 1737, an ejectment had been brought against a person to recover certain coal mines, and a verdict was given against him. He afterwards filed a bill for an injunction and an account of the profits; and it was contended, that it was in the nature of an action for mesne profits; but Lord *Hardwicke* held, that it was to be considered as a trade, and that many things were to be taken into account which were not taken into account in the rent of a landed estate; and finding that the plaintiff at law had obtained the verdict unrighteously, he said, upon the principles which I have mentioned, he would decree an account of the mesne profits; and stated, among other reasons, that a mine was in the nature of a trade. But if the Court will take jurisdiction in that way, it must take it with all the difficulties which belong to it. If a man is mortgagee of a mine, and the mortgagor comes, as you do here, to complain of mismanagement, the first thing that requires consideration is, what is a mortgagee of a mine required to do, or what omission on his part will you call mismanagement? To put a case by way of illustration; suppose a person is mortgagee of a mine which is likely to be much improved by a large expenditure; if he were owner, he might speculate for himself as much as he pleased; the advantages, whatever they might be, would be his, and if it turned out unfortunate he would bear the loss. But can a mort-

(a) Vol. i. p. 302.

1822.

Rowe
v.
Wood.

gatee be required to do that? Can he be required to risk his own fortune in speculation, and to incur hazard in an adventure which is ultimately to redound to the benefit of the mortgagor? I apprehend that he cannot, and that at the utmost he is not bound to advance more than a prudent owner. So, taking this as the case of a partnership; with respect to the head of mismanagement, I should like to hear to what expence a partner can be called on to go, if he happens to be a very large creditor of the partnership trade. I was the more struck with this, because I felt great difficulty in a case lately before the Court, in which Miss *Vane* was tenant for life of certain collieries in the county of *Durham*; when it came to be considered by the master what part of the property was to be expended in coal adventures, considerable difficulty occurred. She was tenant for life of the mines, and was therefore bound to work them with due care and attention to the interests of those who were to come after; but what was due care and attention on her part, and on that of the Court who had to manage them, and what was risk and speculation, was very difficult to settle. There must be clear mismanagement, therefore, of a particular and specified nature, if the case is to be put upon that.

With respect to the circumstance of the Defendant being both mortgagee and partner, it is one which, if the facts were clear, deserves a good deal of consideration. As a mortgagee, he would have certain rights, and if he filled that character only, would be bound to account with the mortgagor in a particular and special manner; and it is no inconsiderable hardship on him, that he must account not only for what he has made, but for what without his wilful default he might have made. As a partner, he would not be obliged so to account; and a question may arise hereafter, whether the

the account should be directed upon the principle of partnership only, or whether a decree can be framed, partly upon the principle of partnership, and partly, if I may so express myself, upon that of mortgageeship. If a mortgagee chooses to become a partner, the management must be considered with reference to the benefit of the other partner, as well as to the rights of mortgagor and mortgagee; and it will be difficult to make out, that the mortgagee can wholly exclude his partner from interference in the partnership. It strikes me, however, particularly with reference to the agreements of 1818 and 1819, that this is not precisely the kind of motion which ought, at least in the first instance, to have been made. I cannot put these instruments entirely out of consideration, because a party says that he will not be bound by them.

1822.

Rowe
v.
Wood.

Considering the question as between mortgagor and mortgagee, I do not know of any instance where a mortgagee in possession has said by answer that any thing was due to him, that the Court has tried upon affidavits against the answer, whether that was true or not. In *Beckford's* case, I said that if he would swear sixpence was due, I would not appoint a receiver. It is impossible for the Court to go on, if it is thus to try the question of the account between mortgagor and mortgagee.

March 20.

On a motion for a receiver against a mortgagee, insisting by answer that he has not been fully paid, the Court will not try, by affidavits, the question whether any balance is due to him or not.

The original connection between these parties was that of mortgagor and mortgagee; and if a receiver or manager is to be appointed, in other words, if the possession is to be taken from the mortgagee, it must be on such grounds as this Court acts upon in such cases; and if it is not, therefore, clearly shewn, that the mortgagee is fully paid, and that almost by his own admission, this

March 22.

1822.

Rowe

v.

Wood.

this Court will not deprive him of the possession. *Beckford's* case (a) is the utmost length to which the Court has ever gone; and in that case the mortgagee would not state that sixpence was due to him. It was however contended, with reference to this, that, attending to the observations made on four particular items mentioned in the original bill, and the answer sworn in 1817, the mortgage must be understood to be paid. It struck me that it was quite impossible to look at this case in that point of view, because the instruments of 1818 and 1819 must be taken to be binding, until the Court has got to that stage of the cause in which it can pronounce, if it should be authorised so to do, that they ought not to stand; and in the former deed it was contemplated that a balance was due to *Wood*. If those agreements stand, although it may be very questionable, whether some of the items in the account will be allowed when the cause comes to a hearing, I cannot say that nothing is due, and the Court must get to that extent before it can appoint a receiver.

But I do not look at this case as one simply of mortgagor and mortgagee: under the agreements for the purchase of certain shares in the mine, which, although *Wood* was desirous of getting rid of, must stand until set aside by decree, the parties became partners; subject to *Wood's* demand on *Rowe's* share for the balance of his account. If they had been merely partners, and no rights had been created by the relation of debtor and creditor, the case would have been very simple; one partner cannot exclude another from an equal management of the concern; and it is the duty of each to keep precise accounts, and to have them always ready for inspection, and, in short, to keep good faith towards each other; but whatever might have been their

(a) See vol. i. p. 649.

rights under the previous instruments, I am bound to look at the agreements of 1818 and 1819, and to consider them as valid, notwithstanding the allegations in the supplemental bill, until they are got rid of by decree. If so the rules as to partners cannot regulate all their rights, because under the last instrument they have stipulated that, whatever might be their original obligations, they will deal on the terms contained in those agreements.

1821.

Rowe
v.
Wood.

It is said that *Rowe* quarrels with these agreements, and is not entitled, therefore, to any benefit from them; but I think that the Defendants are bound, without prejudice to the questions in the cause, to let him have the benefit of them, and, therefore, whatever may be the meaning of that part of the agreement which provides that he is to have the controul of the working part of the mine, he has a right to have it until the equities are arranged.

Pending a suit to set aside agreements, held that the Defendants were bound to give to the Plaintiff the benefit of those terms which were for his advantage.

The circumstances respecting the blank acceptances, which were sent to *Rowe*, have been alluded to, and certainly the answer of *Wood*, that he can give no account of them, is very unsatisfactory. But I think it is now too late to complain of that transaction, though I have no hesitation in saying, that if it were now to take place, and this sort of answer only were given, it would be such conduct on the part of a partner as this Court would not allow. At present I do not see my way to appoint a receiver; but I think that *Rowe*, subject to the equities which may be ultimately declared between the parties, has a clear right to insist that regular accounts shall be kept of all receipts, payments, transactions, and so on, relative to the mine, and to have constant access for the purpose of inspecting the accounts; and also, that, subject to

1821.

Rowe
v.
Wood.

those equities, he has a clear right to controul the working of the mines; and if he is impeded in the exercise of any of these rights, let him come to the Court again: the application, after the other parties have been apprised of what the Court expects them to do, will be differently treated.

March 27

Ex parte HUNT.

When the bankrupt is apprehended under a Judge's warrant, pursuant to the stat. 5 G. 2. c. 30. s. 14., the commissioners have the power of examining him, although the time for his surrender has expired; and if his answers are satisfactory, he is discharged, unless indicted; if not, the commissioners have the same power of committing as on other examinations.

THIS was the petition of the bankrupt, praying that he might be released from prison, and might be at liberty to surrender to his commission. Shortly before the commission opened, he had gone abroad; a police officer, with a warrant from the Lord Chief Justice for his apprehension, was sent in pursuit of him, and overtaking him in the *Netherlands*, procured him to be delivered up by the authorities of that country. He was brought to *England*, and committed to prison, where he had remained about a year. The time for his surrender had elapsed before his arrival. He alleged, that it was not from apprehensions of the commission that he went abroad, and that at the time of his arrest he was on his return for the purpose of surrendering. An application for liberty to surrender had been made to the Vice Chancellor, who had refused it, thinking upon the evidence that the bankrupt had intended to abscond.

Mr. *Heald* and Mr. *Lovat*, for the bankrupt, without entering into the circumstances of his conduct, contended that he ought either to be released; or to be tried for the felony. The form of the warrant, committing him to remain till removed by order of the commissioners, prevents him from being discharged under the general gaol-delivery. The commissioners, they

they stated, had been applied to, but thought that they had no power to release him, the time for his surrender having expired.

1821.

Esparte
Hunt.

Mr. Cullen and Mr. Barber, for the assignees, said, that the warrant was in the usual form under the stat. 5 Geo. 2. c. 30. s. 14.; and denied that any application had been made to the commissioners to summon the bankrupt before them; his conduct had been such as not to entitle him to the indulgence of being permitted to surrender.

The LORD CHANCELLOR.

It appeared to me at first, that if he was committed for not surrendering, the commitment must have been till delivered by due course of law; and then, at the next gaol-delivery, if there was an indictment preferred, he would be tried, if not he would be discharged, unless some cause was shewn against it. But if committed under the Judge's warrant, issued upon the commissioners' certificate, this is the proper form, and his remedy is to give notice to the commissioners to call him before them and examine him. That does not make it necessary for the person holding the great seal to make any order to enlarge the time for his surrender, which must depend on all the circumstances. I agree, that if he were committed for felony, the commissioners would have no power over him. But here the Chief Justice committed him under the statute, which gives an auxiliary power to judges and justices to apprehend bankrupts, for the purpose of bringing them before the commissioners to be examined; after examining him, they are to deal with him as they think fit; he cannot go back again under the Judge's warrant; the gaoler would not be authorised to receive him under that. He should apply to the commissioners to issue their

1821.

Ex parte
HUNT.

warrant to bring him before them, and if they refuse to do so, then he should petition stating their refusal.

I think it is clear, looking at the 14th and 15th sections of the act; that whether the time for his surrender has or has not expired, the commissioners ought to summon him. If, after being apprehended, the bankrupt surrenders within the time, he is by the 15th section to have the benefit of the act in the same way as if he had come in voluntarily. If he is not within the time, the commissioners have not, in general, power to take his surrender or examine him afterwards. But the 14th section, contemplating both cases, of the time being expired, and of its not being expired, directs that in each case he is to go to gaol, and the gaoler is to give notice to the commissioners, who are empowered and required forthwith to issue their warrant to bring him before them to be examined. In each case it gives them power to examine him, but if the time is expired, he continues liable to be indicted. When the commissioners have examined him, if they are satisfied with his answers, then, if he has not been indicted, he will go at large. On the other hand, if they are not satisfied with his examination, they may commit him; for the act having given them the power of examining him, they must have the same power of committing for unsatisfactory answers, as on any other examination.

The shortest way will be for one of the commissioners to inform me what applications have been made to them.

In consequence of what fell from His Lordship, the bankrupt was soon after brought up before the commissioners and discharged.

HARRISON v. GURNEY.

1820.
Dec. 16. 18.

1821.
March 22.
27. 29.

THIS was a suit by some creditors claiming under a trust deed of the 21st November 1811, executed by the Marquis of *Headfort*, and his son Lord *Bective*; a decree had been made in November 1816, for the execution of the trusts, which was in prosecution in the Master's Office, and a receiver had been appointed of the estates comprised in the deed, some of which were situated in *Ireland*. A motion was now made on the part of the Plaintiffs, for an injunction to restrain the Defendants, *Gurney* and *Bentley*, two of the trustees, from proceeding in a suit commenced by them in the Court of Chancery in *Ireland*, the bill in which was filed in *June* last, and prayed the execution of the trusts of the deed of November 1811, a sale of the estates, and a receiver; the answers had not been put in.

Trustees for creditors, after a decree for the execution of the trusts, restrained from proceeding in a suit in the Court of Chancery in *Ireland*, having the same objects.

Mr. *Hart* and Mr. *Sugden*, in support of the motion, suggested that the object of the suit in *Ireland*, was to embarrass the proceedings here, and to prevent the trustees' accounts being fully investigated, and that it was probable some endeavour would be made to get the possession of the *Irish* estates out of the hands of the receiver.

Mr. *Wetherell* and Mr. *Tinney*, on the other side, desired that the motion might stand over, to procure some information from *Ireland*, which the Lord Chancellor permitted, upon their undertaking to do nothing in the mean time.

Booth
v
Leycester } IK
J. 579.

G o s
Wedderburn
Wedderburn }

On Ridge v. Minto.
2 Bear 2 D. 8 Mar 24
211

1821.

HARRISON
v.
GURNEY.

March 22. 27.

On the motion being brought on again, it was stated by Mr. *Tinney*, that the trustees had been under the necessity of instituting a suit in *Ireland* for the purpose of calling the receiver of the estates situated there to an account; but that they had found that the Court of Chancery there would not entertain the suit, unless it extended to a general administration of the property. They had, therefore, commenced the suit in question, intending it to be subsidiary to the *English* suit, and only to be enforced so far as regarded the receiver's accounts. He proposed that it should be referred to the Master, to enquire whether it was fit that the suit should be continued, or any other proceedings commenced.

The *Lord Chancellor* said, it struck him, that the view which had been taken of the subject in *Ireland* was incorrect. If there was a receiver in *Ireland*, the trustees might file a bill against him for an account, without making it a general suit. His Lordship added, that he would consult *Lord Redesdale*.

March 29.

The *Lord Chancellor* granted the injunction, restraining the trustees from proceeding in the second suit, saying he thought there was no reason for it. If they wished to call the receiver to an account, they might do so, but if they thought that they must connect with that a suit for the execution of all the trusts of the deed, he was of opinion that a suit to that extent was unnecessary, and that they ought not to go on with it. (a).

(a) See *Bushby v. Munday*, 4 *Mad.* 597., where an injunction was granted to restrain proceedings in the Court of Session in *Scotland*.

His Lordship doth order, that the said Defendants, *S. Gurney* and *J. Bentley*, and their solicitor, *Mr. J. E.*, be restrained by the order and injunction of this Court from further prosecuting the suit instituted by the said Defendants in His Majesty's High Court of Chancery in *Ireland*, by bill filed on the 20th day of *June* 1820, for all or any relief, orders, directions, matters, and things provided for and decreed in this cause by the decree, dated the 16th of *November* 1816, or relating thereto, or the trusts of the indenture of the 21st of *November* 1811; in the pleadings of this cause mentioned until the further order of this Court.

Reg. Lib. A. 1820. fo. 1012.

1821.
HARRISON
v.
GURNEY.

CECIL v. BUTCHER.

ROLLS.
March 20, 21.
29.

THE bill stated that the Plaintiff's father, *Joseph Cecil*, being seised of a freehold estate at *Little Sheffield*, in the township of *Eccleshall*, by indenture dated the 1st of *August* 1807, in consideration of natural love and affection for the Plaintiff, his son and heir apparent, and for his advancement, preferment, and present maintenance, covenanted to stand seised of his messuages, lands, and hereditaments in the township of *Eccleshall*, in the parish of *Sheffield*, in the county of *York*, to the use of the Plaintiff in fee. He continued in possession of the premises comprised in the deed, and of the the deed itself, till his death in the year 1813; upon which the Defendants, the trustees of his will, and his wife and children of a second marriage, entered into possession. The bill charged, that the Plaintiff was unable to try his right to the premises at law, by reason of the deed of *August* 1807,

Bill seeking relief upon the loss of a conveyance, executed to give a colourable qualification to kill game, retained for a year, with liberty to bring an action.

A conveyance executed by a father, to give a colourable qualification to his son, is kept in his possession during his life without being used, or made known to the son. Whether it is valid at law. *Qu.*

1821.

Cecil
v.
Butcher.

being in the power of the Defendants, and prayed that they might deliver possession with 'the title deeds, and an account of the rents and profits from the date of the deed.

It appeared in evidence that *J. Cecil*, the father, had, in *July 1807*, given instructions to his solicitor to prepare a conveyance of his property in *Eccleshall* to the Plaintiff, saying at the time, that he had a pack of hounds, and that he wished to give his son a qualification to hunt with them, and to shoot; and that the *Eccleshall* estate would be sufficient for that purpose; he desired the deed might be ready for execution when he next came to *Sheffield*, which he said would be soon, as he was afraid an information would be laid against the Plaintiff, by a gentleman in the neighbourhood, for hunting or shooting, and he wished the qualification to be in readiness. The deed was prepared according to a draft, which was produced in evidence, and executed by *Cecil* at the solicitor's office in *Sheffield*. He took the deed away with him, and on his setting out to return to his residence at *Dronfield*, about six miles from *Sheffield*, left it in the hands of *J. Butcher*, with directions to keep it till he should next come to *Sheffield*: about a week after he called for it and took it away. *Butcher*, who was an attesting witness, understood that it was a qualification to enable the Plaintiff to kill game. *Cecil* had mentioned to other persons that he had qualified his son; he had said to one witness, in the year 1810, that he had qualified the Plaintiff, by making a deed of gift of the *Little Sheffield* estate to him, but he did not wish him to know it, for fear he should go beyond bounds. There was no trace of the existence of the deed after the time that it was re-delivered by *Butcher* to *Cecil*; the Defendants had not found it among *Cecil's* papers on his death, and disclaimed all knowledge of it.

1821.

CECIL
v.
BUTCHER.

J. Cecil, by his will, dated in 1811, gave all his real estates, and the residue of his personal estate, to trustees, upon trust to pay an annuity of 300*l.* *per annum* to the Plaintiff, and subject thereto, and to some other payments, upon trust for his wife till her death or marriage, and afterwards, as to the real estates, upon trust for the benefit of his younger children. The will gave several powers to the trustees, amongst which was one authorising them, during the minority of any person entitled to the estates, to dig the coals and other minerals to which the testator was entitled within and under his said estates, or the estates of any other person or persons within the parish of *Dronfield* or at *Little Sheffield*, in the counties of *Derby* and *York*. There was a declaration that, after the death or marriage of his wife, the trustees should stand possessed of his leasehold estates situate at *Little Sheffield*, or elsewhere in the county of *York*; and of the residue of his personal estate, in trust, to permit the same to be enjoyed by the person for the time being entitled to his real estates. The Defendants insisted that the estate in question was intended to be comprised in the general devise of all the testator's real estates, and that if the deed of *August* 1807, was established, the Plaintiff was bound to elect between the estate claimed by him, and the annuity given him by the will. It was in evidence that the testator had, in fact, no leasehold estate at or near *Little Sheffield*. The estate at *Little Sheffield* was stated to be worth about 140*l.* *per annum*, and the testator's other real estates about 800*l.* *per annum*, according to one statement; according to another, his property altogether was about 600*l.* *per annum*.

Mr. *Heald* and Mr. *Parker*, for the Plaintiff, cited *Doe d. Roberts v. Roberts (a)*, as establishing that a deed

(a) 2 *Barn. & Ald.* 367.

having

1821.

CROSSL

v.

BUTCHER.

having been made to give a colourable qualification is no ground of objection to its validity.

Mr. *Horne*, Mr. *Preston*, and Mr. *Seymour*, for the Defendant, remarked that the evidence of the solicitor only stated the deed to have been executed; not speaking in the usual manner to the sealing and delivery. With respect to the preparation of the deed, he had exceeded his instructions, which, he says, were to make a qualification, by preparing a conveyance in fee, though a life estate would have been sufficient. The testator, therefore, executed it under the mistaken idea that it was conformable to the instructions he had given, and this is one ground for withholding relief upon it.

The Plaintiff is a mere volunteer; the grant is without any consideration; and he cannot, therefore, have the aid of equity to perfect it. See 2 *Mod.* 603, and *Corbett v. Bold (a)*. Voluntary conveyances, though valid at law, are considered in equity with reference to the circumstances of their execution, and the mode in which they have been dealt with by the grantor; and in some instances have been relieved against. *Naldred v. Gilham (b)*, *Cotton v. King (c)*. This has most frequently happened, in cases like the present, where the deed has been colourable, only made for the purpose of evading some law, as in *Ward v. Lant (d)*, to avoid taxes; in *Birch v. Blagrove (e)*, to escape from serving an office; and in *Platamone v. Staple (f)*, for a qualification to sit in parliament. The circumstance relied on in the two latter cases, that the deed was never used for the purpose for which it was made, occurs here, it not appearing that any information was ever laid. The deed also was re-

(a) *Proc. in Ch.* 84.(b) 1 *P. W.* 577.(c) 2 *P. W.* 558.(d) *Proc. in Ch.* 182.(e) *Amb.* 264.(f) *Coop.* 250.

tained by the grantor in his own possession. *Doe v. Roberts* differs in both these particulars. They also cited *Brackenbury v. Brackenbury*. (a)

1821.

CRCIL
v.
BUTCHER.

But if the Plaintiff be entitled to the estate thus conveyed, he must elect between it and the annuity bequeathed to him; it being clear that the testator intended to include that estate in the general devise in his will. Freehold estates may pass under the description of leasehold when the testator has no leasehold property in the place mentioned; *Day v. Trig* (b), *Denn. d. Wilkins v. Kemeys* (c); and though the devise is in general terms, yet the intention of including the *Little Sheffield* estate appearing from the trust subsequently declared, raises a case of election, as in *Uneff v. Wilkes* (d).

Mr. *Heald*, in reply, contended that the execution of the deed was sufficiently proved, and that though a defective conveyance could not be aided on behalf of a volunteer, yet the grantee of a valid deed, whether voluntary or not, must be entitled to that which it conveys to him and to the possession of the deed itself. The Plaintiff does not seek to have the instrument perfected, but only to procure the enjoyment of that which is his at law, but for which he has no legal remedy. The only question, therefore, is, whether the deed is valid? and upon this question the case is distinguishable from some of those cited, by the circumstance that the Plaintiff was ignorant of the transaction, and was, therefore, not himself involved in any purpose contrary to the policy of the law, which his father may have entertained; he was not *particeps criminis*. That might, perhaps, be a ground for refusing relief; as

(a) *Supra*, p. 391.(c) 9 *East*, 366.(b) 1 *P. W.* 287.(d) *Amb.* 430.

might

1821.
 {
 CECIL
 v.
 BUTCHER.

might the circumstance of getting possession of the instrument clandestinely, which occurred in *Naldred v. Gilham*, and *Brackenbury v. Brackenbury*. In the former case there seems to have been some imposition practised. *Birch v. Blagrove* is treated by Lord Hardwicke as a case of mistake. He cited *Barlow v. Heneage*. (a)

The MASTER of the ROLLS.

This is a bill by the eldest son of *Joseph Cecil*, deceased, claiming the benefit of a deed executed by his father, purporting to give him an estate in fee simple; the Plaintiff coming into equity to obtain legal relief, on the ground of the loss of the instrument. The case is of considerable importance from the number of conflicting authorities upon the subject.

The facts appear to be these. The father was a gentleman possessed of an estate of about 600*l.* a year, who kept a pack of hounds; and he was apprehensive that his son, who was also fond of the diversion of sporting, might become the object of a prosecution as an unqualified person. He therefore gave to his attorney verbal directions for a conveyance; he, in consequence, prepared a draft, which, on the face of it appears to require some explanation, from the various erasures, and from the estate tail having been changed to an estate in fee. The instructions were only to make a conveyance to qualify him, not expressing what estate was to be given. But I think it fair to suppose that the gentleman, finding the property to be worth about 140*l. per annum*, and that though by the statute an estate of 100*l. per annum* is a qualification, yet, that if it be a life estate, the value must be 150*l.*, thought it best that it should be an estate of inheritance; and he probably preferred an

(a) *Proc. in Ch.* 210.

estate in fee, to an estate tail, because it might be more easily got back again.

1821.

Cecil
v.
Butcher.

I think it is clear upon all the evidence, that the object was singly to qualify the son to kill game. In giving directions to his attorney, he said, that he was afraid of an information, and was desirous that the qualification should be in readiness; and the attorney accordingly states, that in *August* he called and executed the deed. It is said, this general expression does not necessarily imply that it was sealed and delivered; but I think there is no weight in the objections. The witness, as an attorney, must know the meaning of the word, it would be a great misrepresentation if he used it in any sense, except that which is the ordinary one, and that in which it is used in the pleadings. We must, therefore, take it to have been properly executed, and, consequently, to have been a complete and valid deed; and this draft, with all its obliterations and alterations is sworn to be an exact copy. The attorney says he did not retain the possession of the deed longer than while *Cecil* remained at his office, but he delivered it to *Cecil* when he went away; from which it appears that it must have then been in the possession of the attorney; *Cecil* handed it over to him after executing it. He redelivers it to *Cecil*, who gives it to *Butcher* to keep for him for a few days. This temporary possession by *Butcher*, the friend of *Cecil*, and with an express direction to keep it for him, was little more than if he had kept it himself; all this is, however, of no importance with respect to the legal validity of the deed.

It is, I think, evident that *Cecil* never communicated this transaction to his son; he was anxious that he should not know of it. He does not appear ever to have parted with the deed, but retained it in his own possession.

On

1821.

CXCII.
v.
BUTCHER.

On his death it was not found among his papers ; it was probably either lost or destroyed. The deed is recited to have been made for the advancement and present maintenance of the son ; notwithstanding which, the father continued in possession and enjoyment of the estate till his death. By his will he makes another provision for his son, who, having afterwards found this copy of the deed, files this bill.

The question is, whether the Court ought to give relief on the case thus made by the Plaintiff. If we were to determine *in foro conscientiae*, whether it was the intent of the father to transfer the right, or only to have a deed ready to be used as a qualification, if wanted, the evidence would be very strong to shew that there was no design of transferring the ownership, that the object was special, that it was made to be in readiness for a particular purpose, consistently which which, the father might continue in possession. In a court of law, the only question is, whether the deed is valid; and there can be no enquiry how far it is honourable or equitable to insist upon it. If the deed is complete, whether it is a qualification to sit in parliament, as in the case of Colonel *Pitt* (a), or to kill game, as in *Roberts v. Roberts*, the party cannot be heard to allege his own fraudulent purpose, it being a fraud upon the law to attempt to give another a qualification without making him owner of the estate; he is estopped from confining the operation of his deed, by avowing that he had such a purpose. In *Curtis v. Perry*, Lord *Eldon* mentions a case where Lord *Kenyon* dismissed a bill to have a reconveyance of an estate given as a qualification to sit in Parliament. In the case of *Curtis v. Perry* itself, ships being registered in the name of one partner, it was held that the other, or those

(a) Cited *Amb.* 266.

claiming

claiming under him, could not allege that he was interested in it, and explain away the effect of the registry, by stating it to be for the purpose of evading an act of parliament.

1821.

CXCII.

v.

BOTCHER.

The doctrine of courts of law in these cases is well settled; but we are here in a court of equity, and we must consider the subject with reference to the numerous authorities upon it, and must attend to the principle to be collected from them. They have not depended singly upon the question, whether the party has made a voluntary deed; not merely upon whether, having made it, he keeps it in his own possession; not merely upon whether it is made for a particular purpose; but when all these circumstances are connected together, when it is voluntary, when it is made for a purpose that has never been completed, and when it has never been parted with, then the courts of equity have been in the habit of considering it as an imperfect instrument. If it was understood between the parties, that it should only be kept in readiness to be used if wanted, or if it is made *ex parte*, and never intended to be divulged to the grantee, unless the particular purpose requires it; the question is, whether there is not then a *locus pœnitentiæ*; if, under such circumstances, the grantee furtively gets possession of the deed, though it is good at law, yet he has obtained it contrary to the intention of the grantor, who never meant him to have it; and will not a court of equity, at least, refuse him its assistance? This principle will be found to pervade all the cases. It may, perhaps, when the transaction is known to both parties, rest upon the supposition of a collateral agreement between them, that the deed should not be used, — should not be called forth into life, unless wanted for the special purpose, and that the deed being executed on the faith of that agreement, it is contrary to good conscience and equity to call

A voluntary deed, never parted with, and executed for a purpose that has never been completed, considered in equity as an imperfect instrument.

1821.

CECIL

v.

BUTCHER.

call for it, and apply it beyond the purpose for which the grantee knew it to be intended.

The first case is *Ward v. Lant*, where the father executed a bond to his daughter, to screen himself from taxes, always kept it by him, though it was made payable immediately: this circumstance of the grantor keeping the possession of the instrument, and never delivering it to the grantee, is a very material feature in all the cases. The Court then considered all the circumstances as evidencing an incomplete transaction; the Lord Keeper thought, that if the daughter had got possession of the bond, equity would have relieved, going a step further, than the Defendant here requires by setting the bond aside. There is another case in the same book, *Barlow v. Heneage*, (a) which, as far as as it goes, is an authority on the other side; a father having made a voluntary settlement and bond in favour of his daughters, kept them in his possession, and received the rents and profits till his death; it was decided by the same Lord Keeper, and considering, from all the circumstances, that the transaction was complete, he said, they must be treated as the father's deeds, and decreed them to be carried into execution.

The next case is *Clavering v. Clavering*, (b) where the Court would not relieve against a voluntary settlement, on the ground of the settlor not having acted on it, and having made another settlement; Lady Hudson's case is there cited, where a father, displeased with his son, made an additional jointure on his wife, and afterwards cancelled the deed; she, notwithstanding, recovered upon it. In these two cases, it is to be observed, that the deeds were not made with the view of being brought

(a) *Proc. in Ch.* 210.(b) 2 *Vern.* 473.

forward at a future time, for a particular purpose; they were complete at the time, though the parties afterwards repented.

1821.
CECIL
v.
BUTCHER.

The next case is *Naldred v. Gilham*. (a) It is true, that the *Lord Chancellor* there lays some stress upon what he conceives to have been a degree of imposition practised on the lady, who made the settlement. But I do not see any evidence that she gave instructions for a revocable instrument, and that another was prepared. She seems to have supposed, that keeping the deed in her possession, would keep the estate in her power. It does not appear, that she signed a deed different from what she intended, but that she did not know the legal effect of it. The case is cited by *Lord Hardwicke*, in *Boughton v. Boughton* (b), as a case to be followed; he states the circumstances of it, and mentions, as one of the reasons of the decision, that the keeping the deed by her, implied an intention of revoking.

The next case, in order of time, is *Cotton v. King* (c): the *Lord Chancellor* there said, that if the Lady *Cotton*, after executing the deeds, kept them in her own power, and they had been got from thence, she should not have been bound by them, and so, if they had been in her agent's hands. In this case, *Butcher* was the agent of *Cecil*. But the point which the *Lord Chancellor* thought of most weight against Lady *Cotton* was, that she had declared an intention to put it out of her power; that, he thought, took it out of that line of cases where the Court considers the deed imperfect, and not meant to be followed up by any practical result. The same principle is to be found in the subsequent case of *King v. Cotton* (d); though these cases, at the utmost, are rather

(a) 1 P. W. 577.

(c) 2 P. W. 358.

(b) 1 Atk. 625.

(d) 2 P. W. 674.

1821.

Cecil

v.

BUTCHER.

dicta than decisions, having finally turned upon other points.

Birch v. Blagrove (a), decided by Lord *Hardwicke*, is a strong case. His Lordship begins, by saying that he lays aside all considerations of fraud and trust; and so I think that here all such considerations are to be laid aside: we are not to view the Plaintiff as a *particeps criminis*; he was not a party contriving this sham conveyance; it was the father's act only. Lord *Hardwicke* mentions, as the distinguishing feature of the case, that the father, who executed the deed, to avoid serving the office of sheriff, had not actually taken the oath. If the deed had been acted on, it would have been too late to get it back; but, in the mean time, he considered it as preparatory only. On this principle, he says, that in the case of Colonel *Pitt*, if he had never sat in parliament by virtue of the conveyance, he should have thought that the decision ought to have been different, and he recognizes the authority of *Ward v. Lant*. This then was a case where Lord *Hardwicke*, sitting in a Court of Equity, thought himself warranted not only in refusing relief upon a voluntary conveyance, kept in the possession of the settlor, and intended for a purpose that did not take effect, but interposed to set it aside. There is another case entitled to less authority, that of *Platamone v. Staple* (b), where a conveyance was made to give a qualification, but was never applied to that purpose; it was thought upon that ground that there was sufficient doubt to grant an injunction till the hearing: it is not therefore an absolute decision.

The case of *Roberts v. Roberts* (c), in the Exchequer, may certainly be said in some measure to call in question

(a) *Amb.* 264.(b) *Coop.* 250.(c) *Daniel*, 145.

1821.

 Clerk
 &
 Solicitor.

the importance of the circumstance of the deed not having been used. The *Lord Chief Baron* states the strong inclination of his opinion to be, that that circumstance was not a sufficient ground for calling it back: but it is to be observed that in that case, as in *Plattimone v. Staple*, the Court had granted an injunction. The testator also had there delivered the deed to his brother; he had put it out of his power. It was also undoubtedly a case where both parties were engaged in the transaction: if it was a fraud upon the law, they were equally consensant of it; and the Court might therefore well say that it would assist neither. When it came on for trial at *Nisi Prius*, the learned Judge thought the deed was void: the Court of King's Bench, however, granted a new trial; the *Lord Chief Justice* observing as a distinction, that in *Birch v. Blagrove* and *Ward v. Lant* the deeds had never been delivered. With respect to *Plattimone v. Staple*, he says, that the party might very likely have intended to give a rent-charge only in the event of the Defendant's becoming a member of parliament; and Mr. Justice *Bailey* observes upon the same case that it was executed for a special purpose which never took effect, thus recognizing the distinction on which that case was decided. *Roberts v. Roberts* is therefore distinguishable from this case; there the deed was complete; it was to stop a prosecution then pending, and had actually been delivered into the hands of the donee.

In addition to these cases there is that of *Brackenbury v. Brackenbury*; which is distinguishable in one respect; a fraud having certainly been practised in getting possession of the deed. The Vice Chancellor thought that as the ejectment might be defeated by setting up an outstanding term, the Plaintiff ought to be restrained from setting it up: the *Lord Chancellor* intimated his opinion, that it was a case in which he would relieve

1821.

Cecil
v.
Butcher.

neither party; and that the Plaintiff could therefore not be restrained from using the term; or that, at least, if it could be done, it must be by bill.

This is a view of all the cases; and difficult as it may be to extract a principle from them, yet I think there is a great preponderance of authority in support of the proposition, that in a case where a voluntary deed is made without the knowledge of the grantee, when it is made for a special purpose for which it was never required to be made use of, when it has been kept in the hands of the grantor without ever being acted on, a Court of Equity will not relieve upon it. My only doubt is, whether I should not take the same course as in *Roberts v. Roberts*, by allowing the Plaintiff to proceed at law; for if he should substantiate his title at law, it may be a question whether he may not resort back here for the title deeds and the account of the mesne profits. The Plaintiff's case indeed, may as easily be established at law as in equity: the deed being lost, and the Plaintiff having a copy of it, wants nothing but a discovery whether the Defendants have it; and they admit it to be lost, there is therefore no difficulty at law. It is not a ground for dismissing a bill, that the party has come into Equity for relief, when his case required a discovery of the loss of the deed, because originally there was not, as there is now, the same facility in recovering in such cases at law as in equity. The loss gives a right to proceed in this court to recover the property; but then a case must be made out for equitable relief; which has not been done here.

On the second point, I think that there is enough to put the Plaintiff to his election if he should succeed at law. It is clear that the estate is by mistake described as leasehold, the testator having no other estate at the place.

place. The latter passage in the will is quite inexplicable, unless it refers to this estate, and unless he considered it to be included in the previous devise. Though he had conveyed it away, yet if he conceived it to be his, and treated it as such, then it is the common case of one person giving away the estate of another ; if there was an intent to pass it, it comes within the case in *Ambler*. I only throw out this, which is my present impression, as it may be the means of saving the parties some expence.

1821.
 {
 CECIL
 v.
 BUTCHER.

If the Plaintiff succeeds at law, and the Defendants should apply to restrain him from proceeding on the judgment, that will be a very different question, which I do not now decide. At present I will retain the bill for a year, with liberty for the Plaintiff to bring an action : he does not want any admission from the Defendants except that of the deeds being lost : but, I think, upon the whole, it will be best not to impose any terms upon them.



AN

I N D E X

TO THE

PRINCIPAL MATTERS.

ABBEEY LANDS.

See TITHES, 11. 16, 17.

ADMINISTRATOR.

See PLEADING, 1.

AGREEMENT.

Pending a suit to set aside agreements; held, that the Defendants were bound to give to the Plaintiff the benefit of those terms which were for his advantage. *Page* 559

See SPECIFIC PERFORMANCE.

APPEAL.

See PRACTICE, 8.

ARBITRATION.

1. A bill will not lie to set aside an award on a question of fact re-

ferred to arbitration, except for corruption, partiality, or irregularity of conduct in the arbitrators.

Page 249

2. On a bill to impeach an award, evidence of the merits only to be received so far as it throws light on the conduct of the arbitrators.

259

3. Irregular for two arbitrators to meet without notice to the third; but not a sufficient ground to set aside the award, when the substance was settled in his presence.

Semble.

261

BANKRUPT.

1. A creditor having paid himself part of his debt by the sale of goods taken under an execution, the validity of which was disputed,

P p 4

- admitted (after the choice of assignees) to prove for the difference. *Page 220*
2. Petition to stay the certificate, on the ground of the rejection of a debt, having been served on the bankrupt only one day before the petition-day, dismissed with costs. *Ibid.*
3. A promissory note is drawn for the accommodation of *A.*, who transfers it to *B.* and *C.*, without indorsement for valuable consideration, and afterwards becomes bankrupt, and dies intestate. Held that *B.* and *C.* might recover against the drawer, the note having been indorsed many years after it was due by *B.* to *B.* and *C.*, *B.* having for that purpose procured letters of administration to the effects of *A.* 237
4. A bankrupt, to a question whether he had not within six months previous to the commission, executed two conveyances of his estate and effects, or part thereof, to his son, answered "not to my knowledge." This answer held to be satisfactory; no further questions having been put. 437
5. When a bankrupt, committed by the commissioners, is brought up by *habeas corpus*, notice must be given to the assignees; and notice on Saturday afternoon for Monday, unless his right to be discharged is perfectly clear, is not sufficient. 453
6. It is no objection to a warrant of commitment reciting several examinations, that it omits to mention that the bankrupt who had been committed was discharged at the conclusion of one of the examinations. *Page 453*
7. A mortgagee may petition to stay a bankrupt's certificate. 548
8. The circumstance of his not having tendered any proof till the third meeting, will not prevent him from presenting such a petition. *Ibid.*
9. Where the amount of the mortgage debt was disputed, the certificate was lodged in the bankrupt office, till it should be ascertained. *Ibid.*
10. When the bankrupt is apprehended under a Judge's warrant, pursuant to the stat. 5 G. 2. c. 30. s. 14., the commissioners have the power of examining him, although the time for his surrender has expired; and if his answers are satisfactory, he is discharged, unless indicted; if not, the commissioners have the same power of committing as on other examinations. 560

BARON AND FEME.

1. Husband and wife having a joint power of appointment over the wife's estate, agree in writing to sell it. A specific performance cannot be compelled against them. *Semle.* 425
2. Under a contract by husband and wife for sale of the wife's estate, the Court will not decree him to procure her to join. 425

3. A married woman cannot by consent, on examination in court, part with her interest in a fund settled on her marriage for her separate use during her life, with a clause against anticipation, with remainder to the survivor of her and her husband. *Page 456*

4. Money bequeathed to be invested in an annuity for the life of a married woman, for her separate use, paid to the husband upon her consent taken in court. *457*

5. A fund in which a married woman has a reversionary interest, transferred to a purchaser, on her consent taken in court. *458*

BIDDINGS.

See PRACTICE, 4, 5.

BILL OF EXCHANGE.

See BANKRUPT, 3. — NE KEAT REGNO. — INDORSEMENT, 1, 2.

CASE.

See PRACTICE, 2.

CHAMPERTY.

Whether a devisee and heir at law can join in a bill claiming an equity of redemption, upon the allegation that questions having arisen as to which of them was entitled to it, they had agreed to divide it between them, *Quare.*

CHARITY.

1. Devise of a house after the death of *A.*, for the use of the master that might be appointed to a school for the instruction of poor persons in *W.*, and a bequest of money upon trust to apply the interest in procuring a master and mistress for instructing poor children, and in keeping the school-house in repair, and to apply the residue of the interest to the poor. Held, that the bequest to the school was void as being connected with the devise of the house; and the amount intended for that purpose being uncertain, the gift of the residue was also void. *Page 270*

2. A bequest of money connected with a devise void by the statute of *mortmain*, fails though the devise is revoked by a subsequent conveyance or surrender. *Semble.*

Ibid.

3. If an undefined proportion of a legacy is to be applied to a purpose void by the statute of *mortmain*, it vitiates the whole. *277*

4. When the fund is applicable at discretion to several purposes, some of which are void and the others not, it will be confined to the latter. *Ibid.*

5. Gift of the residue of a fund after the application of an undefined amount to a void charity, is void for uncertainty. *Ibid.*

6. By deed, a corporation, to which a sum of money has been given for the purposes mentioned in the

deed, and to the intent that it might be laid out in the purchase of lands of the clear yearly value of 120*l.* and more, covenants to pay thereout annual sums of nearly the same amount to certain charities in rotation; the corporation itself being one of those charities, there being no express gift of the surplus, and the decrease and subsequent increase of the rents being in certain events provided for: Held, that the other charities were not entitled to call for a distribution of the increased rents.

Page 294

7. The rules prevailing for the construction of gifts to charitable uses, are to be considered only as furnishing *indicia* of the donor's intention. 317
8. The soundness of the principles that a gift of rent-charge to a charity equal at the time to the annual value of the estate, carries the increased rent, and that as the charity would lose if the fund decreased, it ought to gain if it increased in value, doubted; but being settled by decisions, they ought not to be disturbed. 318
9. In distributing the increased rents of a charity estate, the Court of Chancery has authority to alter not only the proportions in which the objects of the charity would take under the original instruments, but also the objects themselves. 319
10. Although a charity is not barred by the statute of limitation, an adverse enjoyment for a long time is a very material consideration in construing an instrument under which it claims. Page 321
11. The master of a free school being appointed by the persons acting as trustees, and having acted as such for many years, the validity of his appointment is not to be questioned, if he has duly executed the duties of the office. 353
12. The master of a free grammar school permitted to take boarders to be educated in the school, but not so as to prejudice the free scholars. *Ibid.*
13. Several donations partly for the support of a school, and partly for the support of a grammar school, being devoted by the commissioners of charitable uses in 1623, to the maintenance of a grammar school, and that decree having since been followed, the whole revenues must be applied to the uses of the grammar school, at least during the continuance of a master appointed under the present system. *Ibid.*
14. Although in a charity case the proper relief may be granted though not prayed for, yet the state of the record is to be considered with reference to the question of costs. 370
15. Gift to trustees to support a schoolmaster; it is in their discretion to found a grammar school, or a school for teaching other branches of learning, subject to

the controul of the Court of Chancery. *Page* 370

16. On an application for the regulation of a free grammar school, the practice at the period of the appointment of the present master, to be considered during his continuance in office. 374

See GRAMMAR SCHOOL.

COMPANY.

See SOCIETY. — *INJUNCTION*, 6, 7.

CONSENT.

See BARON AND FEME, 3, 4, 5.

CONTEMPT.

See *INJUNCTION*, 1.

CONTRACT.

See SPECIFIC PERFORMANCE.

COSTS.

In a suit for an account of a residue, one of the residuary legatees having by assigning, and taking the benefit of the insolvent debtors' act, rendered two supplemental bills necessary, the additional costs to be borne by his share. 435

See VENDOR AND PURCHASER, 2. — CHARITY, 14.

COUNSEL.

See PRACTICE, 2.

COVENANT.

See *INJUNCTION*, 2. — *PROVISO*.

CROWN.

1. *A.* and *B.* join in a petition to the crown, representing an estate to have escheated, and procure a grant of it to be made to them: Held, that *A.* could not afterwards set up a claim to one part under a prior title in himself, while taking the benefit of the grant as to the rest. *Page* 384

2. The doctrine of election does not apply to grants from the crown. *Semble.* *Ibid.*

3. A grant from the crown made under a mistake, may be recalled, notwithstanding any derivative titles depending on it. 342

See DIGNITY, 4.

CUSTOM.

See TITHES, 12, 13, 14.

DECREE.

See VENDOR AND PURCHASER, 1. — CHARITY, 14. — FRAUD, 1, 3. — PRACTICE, 6.

DEED.

1. *A.*, in a conveyance to uses, reciting that he was desirous that certain estates, derived from his mother's family, should remain in the family and blood of *S. R.*, his maternal grandfather, in consideration of his natural love and affection to his relations, the heirs of *S. R.*, and to the intent that the said estates might continue in the

family and blood of his late mother, on the side of her father; settles them to the use of himself for life, remainder to the heirs of his body; for default of such issue as he should appoint, and for default of appointment, to the use of the right heirs of *S. R.*, with a power of revocation and new appointment. The ultimate remainder is contingent, and will vest in the person who happens to be the right heir of *S. R.*, at the expiration of the estates previously limited.

Page 1

2. If the time at which a remainder in a deed is to vest is not ascertained by the limitation itself, it vests immediately in consequence of the legal presumption in favour of vesting estates; but that presumption may be rebutted or controuled by the intention collected from the recital or any other part of the deed. 81
3. Where a limitation in a deed is perfect and complete, it cannot be controuled by intention collected from other parts of the deed. 84
4. An imperfect limitation must be construed by the meaning and intention collected from the whole of the deed taken together. 88
5. In construing a deed, legal presumption can only prevail in the absence of a contrary intention, or where that is not manifested with sufficient clearness. 89
6. Words of description to be construed according to the intention, if clearly manifested on the face of

the deed, though contrary to their correct technical sense. Page 92

7. The effect of a limitation in a deed, which taken by itself would *prima facie* create a vested remainder, will be controuled by a contrary intention clearly manifested. 113

See CHARITY, 6, 7, 8.—FRAUD, 1, 2

DEVISE.

See CHARITY, 1.

DIGNITY.

1. A dignity is entailed on *A.*, who dies, leaving issue two sons, *B.* and *C.* To a bill filed in the life-time of *B.*, by his eldest son, for perpetuating evidence of his father's marriage. Demurrers by the eldest son of *C.*, who was dead, and the attorney-general, were allowed. 439
2. Whether a Court of Equity has jurisdiction to entertain a bill filed to perpetuate testimony in support of a claim to a dignity. *Qu. Ibid.*

See PLEADING, 2, 3, 4.

DISSENTERS.

1. Jurisdiction for execution of a trust for supporting a dissenting meeting-house, difficult to exercise. 245
2. Pending a suit for the regulation of a dissenting meeting-house, the minister, if performing his duty, will in general be continued, whether duly appointed or not. 247
3. A dissenting meeting-house must continue devoted to the doctrines

originally agreed on at the foundation of the trust, though some of the congregation may change their opinions. *Page 247*

ELECTION.

See CROWN, 2.

EVIDENCE.

An entry by a deceased person may be evidence, though he could not in his life-time have been examined to the fact. *489*

See PRACTICE, 10. — TITHES, 1, 2, 3. 7, 8, 9.

EXECUTOR.

See PLEADING, 1. — BANKRUPT, 3. — INDORSEMENT, 1.

FRAUD.

1. A conveyance executed for the purpose of giving the grantee a colourable qualification to kill game remains, without being made use of, in the custody of the grantor, and, after his death, of his son. The grantee afterwards obtaining the possession of it, by representing that he intended by means of it to impose upon a third person, claims the estate. A Court of Equity will not grant relief to either party. *Semble.* *391*
2. The decree upon a bill filed for the delivery of the deeds, having

directed the Defendant to bring an ejectment, the Plaintiff ought not to be restrained from defeating it by means of an outstanding term.

Page 391

3. Bill seeking relief upon the loss of a conveyance, executed to give a colourable qualification to kill game, retained for a year, with liberty to bring an action. *565*
4. A conveyance executed by a father, to give a colourable qualification to his son, is kept in his possession during his life without being used, or made known to the son. Whether it is valid at law. *Qu.* *565*

GRAMMAR SCHOOL.

1. No incompatibility in the offices of master of a free grammar school and vicar of the parish. *376*
2. An endowment of a free grammar school, without more, means a school for teaching the elements of the learned languages, but an usage to teach other branches of learning may be taken as explanatory of the words, and put a different construction on them. *378*
3. Several endowments, partly for a school and partly for a free grammar school; held, upon the ground of constant usage, that the whole had been legally devoted to the latter purpose. *379*

HEDGES.

See TITHES, 12.

HEIR.

See INFANT.

HUNDRED.

See TITHE, 12, 13, 14.

INDORSEMENT.

1. No difference between indorsement of a note by the party, and one by his personal representative. *Page 243*
2. A note being handed over for valuable consideration, the indorsement is a form which the party is entitled to call for. *Ibid.*

INFANT.

To a bill for sale of real estates by simple contract creditors of a trader against his heir, an infant, the parol may demur. *Semle.* 287

INJUNCTION.

1. Defendant committed for breach of an injunction after notice of its having been obtained, although the order for the injunction had not been served. 264
2. An injunction will not be granted to restrain the breach of a covenant in articles of partnership which has not been infringed for any length of time, where the bill does not pray a dissolution of the partnership. 266

3. Whether the Court will in any case grant such an injunction, unless there is ground for, and the bill pray, a dissolution of the partnership. *Qu.* *Page 266*
4. Injunction to restrain the sailing of a vessel, containing goods sold to a person who had become insolvent, but over which the Plaintiff retained a right of stoppage *in transitu*, refused. 349
5. After the common injunction has been obtained, the Plaintiff may move to extend it to stay trial upon the usual affidavit, although the Defendant, by the rules of the court, must put in his answer before the trial can take place. 388
6. Injunction granted to restrain payment by a friendly society, founded on erroneous principles, tending to exhaust its funds. 390
7. On a bill by some directors of an insurance company, constituted by deed, against another director, alleging misconduct, the Court refused to interfere, by continuing an injunction, the Plaintiffs not having made use of the powers of regulation given them by the deed. 503
8. Trustees for creditors, after a decree for the execution of the trusts, restrained from proceeding in a suit in the Court of Chancery in Ireland, having the same objects. 563

ISSUE.

An issue is not to be directed, unless there be reasonable doubt as to

the fact, and when it depends on evidence, the effect of which can be better ascertained by a jury.

Page 464

See TITHES, 6.

JURISDICTION.

1. No remedy in equity for the recovery of money paid on compromise of an action, where the party had full knowledge of the facts, and the means of proving them at the trial. 249

2. Voluntary payment, conclusive both in equity and law, on the principle that litigation is not to be multiplied. 263

3. A Court of Equity has not jurisdiction in any case to stop goods *in transitu*. *Semle*. 349

4. Whether the Vice Chancellor has power to hear, by consent, a motion, to discharge or alter an order made by the Lord Chancellor. *Qu*. 429

5. The Vice Chancellor, if authorised to discharge an order of the Lord Chancellor's, is not empowered to alter it. *Ibid*.

6. The Vice Chancellor, when sitting for the Lord Chancellor, has not jurisdiction to alter or discharge orders made by the latter. 431

See ARBITRATION, 1. — CHARITY, 9. 14, 15. — DIGNITY, 2. — DISSENTERS, 1. — INJUNCTION, 8. — PLEADING, 4.

LEGACY.

1. Bequest of 1000*l*. long annuities "now standing in my name or in trust for me." At the date of the will, the testatrix had no long annuities, but had 1000*l*. 3 *per cent*. reduced annuities. Held, that that sum passed by the bequest.

Page 207

2. Bequest of the balance in the hands of testator's agents at the time of his death, held to include a sum which he had by letter directed them to invest in the funds, but which was not invested till after his death. 248

3. Gift of residue to be equally divided between the testator's wife, sons, and daughters; subject nevertheless as to the shares of the daughters, which were to be placed in the funds in the names of trustees; the interest to be paid to them for their lives for their separate use, and after their deaths the testator gave the shares, to the interest of which his daughters should have been entitled for life, to their children equally, with benefit of survivorship. Two of the daughters having survived the testator, died without children. Held, that their representatives were entitled to their shares. 279

4. Bequest of personal property held a general residuary disposition, although accompanied with expressions favouring a more limited construction, and pointing only to a particular surplus beyond the property specifically mentioned. 399

5. Principles on which a residuary bequest of a testator's personal estate is extended to that which he subsequently acquires. *Page* 405
6. Very special words required to confine a residuary bequest to the property belonging to the testator at the date of his will. 406
7. Gift of personal property to trustees, to be settled on the marriages of the testator's daughters for their separate use, and on their deaths upon trust for their children, with a limitation over, in the event of either of the daughters dying without having been married, or without leaving any children her surviving. The shares of the children of each daughter are vested, subject to be divested by all dying before their mother; and there being one alive at her death, the representative of two who died before her, held entitled to their shares. 459

LENGTH OF TIME.

- 1 An estate subject to a mortgage in fee, being in settlement with an ultimate limitation to the heirs of *S.R.; A.*, on the expiration of the previous estate, enters, claiming to be entitled under that limitation, and after his death his son, continue in quiet possession, paying interest on the mortgage for twenty years. The devisee of the person really entitled under the limitation, is barred by the length of time. 2
2. Adverse possession of an equity

of redemption for twenty years is a bar. *Page* 191

3. No relief in equity after twenty years, even in cases analogous to those in which a writ of right would lie at law. 192
4. Bill by mortgagee for a sale under a trust for that purpose in the mortgage deed, dismissed upon doubtful evidence of title and possession for twenty years, without payment of interest, demand, or acknowledgment. 223
5. Satisfaction of a mortgage to be presumed after twenty years possession by the mortgagor, without payment of interest, demand, or acknowledgment. *Semble. Ibid.* 223
6. Where a debt is claimed by the Plaintiff, and is disputed by the Defendant, who admits that it has not been paid, lapse of time cannot raise a presumption of payment, but may afford a presumption against the original existence of the debt. 223

See CHARITY, 10.

LIEN.

See SOLICITOR AND CLIENT, 1, 2, 3.

MINES.

See MORTGAGE, 1. 3.

MODUS.

See TITHES, 4, 5. 10.

MORTGAGE.

1. Motion for the appointment of a receiver upon a mortgage of mines,

who had become a partner by purchasing shares in them, upon the ground of mismanagement, and excluding the mortgagor from interference, refused; the parties having regulated their rights by subsequent agreement, and the mortgagee not admitting that his mortgage was satisfied. *Page 553*

2. The rights and duties of a person in that situation not to be governed solely by principles applicable to one who stands simply in the character of a mortgagee or partner. *Ibid.*

3. Mortgagee in possession of mines, not bound to expend more than a prudent owner. *Ibid.*

4. If he can be deprived of the possession on the ground of mismanagement, it must be of a clear and specified nature. *Ibid.*

5. On a motion for a receiver against a mortgagee, insisting by answer that he has not been fully paid, the Court will not try, by affidavits, the question whether any balance is due to him or not. *557*

See BANKRUPTCY, 7, 8, 9.—LENGTH OF TIME, 1, 2, 4, 5.—PARTIES, 2, 3.—POSSESSIO FRATRIS.

MORTMAIN.

See CHARITY, 1, 2, 3, 4, 5.

NE EXEAT REGNO.

Writ of *ne exeat regno* refused, on a bill to enforce an agreement to give a bill of exchange to secure the debt of a third person. *211*

VOL. II.

PAROL DEMURRER.

See INFANT.

PARTIES.

1. In a suit concerning the inheritance of a trust estate, settled on baron C. for life, and after remainders to his unborn children, upon the person who should then be entitled to claim as baron C. in tail; with ultimate remainder to the present baron C. in fee; the person presumptively entitled to the barony, although no person entitled to a prior estate of inheritance is before the Court, is not a necessary party. *Page 2*

2. Two estates being mortgaged together, on the death of the mortgagee the equity of redemption of the one devolves on A., that of the other on B.: B. is a necessary party to a bill by A. for a redemption. *Ibid.*

3. The personal representative of the mortgagor is a necessary party to a bill for the execution of a trust for sale by way of mortgage. *229*

4. In a bill to compel the performance of a covenant to surrender a copyhold estate to A., in trust for others, A. must be a party. *538*

PARTNER.

See INJUNCTION, 2, 3.—MORTGAGE, 1, 2, 4.

PAUPER.

See PRACTICE, 8.

PEERAGE.

See DIGNITY.—PLEADING, 2, 3, 4.

Q q

PLEADING.

1. Plea by administrator *durante minoritate* to bill for accounts of a suit by the executor, for the same purpose in the ecclesiastical court, and sentence, allowed as a stated account, with liberty to except as to subsequent receipts, and an issue directed as to the payment of a particular sum.

Page 201

2. Plea to a bill by a person suing as Earl of S., (the earldom being a Scotch dignity,) that he is not Earl of S., but that the Defendant is Earl of S. and K., and averring that the Plaintiff is the natural son of the late Earl of S. and K., and M. M., who were resident and domiciled in *England* at the time of his birth, and were not married until several years after, overruled: there being no averment, either that the title of S. and K. was the same as that of S., or that the Plaintiff was born in *England*.

541

3. Whether the plea should conclude in bar or abatement. *Qu. Ibid.*
4. Whether the Court of Chancery, for the purpose of deciding on the plea, has jurisdiction to determine to which party the dignity belongs. *Ibid.*

See PARTIES, 1—4. — TITHES, 13.

POSSESSIO FRATRIS.

- A. having a son and daughter by one venter, and a son by another, conveys lands to B., his surety in a

bond, as an indemnity, and dies; B. pays the bond, and mortgages the lands. The eldest son dies. The mortgagee having been in possession without account or acknowledgement, *semble*, there was no *possessio fratris* of the equity of redemption. Page 201

POWER.

1. Bequest of 500*l.* to A. for her life, and at her decease to divide it in portions as she shall choose to her children; and if she died before testatrix, to be equally divided amongst her children. Held, that the children of A. living at her death were the only objects of the power, and as such entitled to a share lapsed by the death of a child to whom it had been appointed. 431
2. A power to appoint the portions in which definite objects are to take, tacitly includes a gift to them in default of appointment. 434

See BARON AND FEME, 1.

PRACTICE.

1. Receiver appointed on the motion of the vendor, pending a reference of title. 236
2. Will of real estate not to be proved on a reference before the Master. 289
3. Opinion of counsel ordered to be produced, where it was taken by a tenant, with reference to his landlord's title, and where the case was stated for the benefit of both parties. 291

4. There is no general rule that a party present at the sale shall not open biddings; each case must depend on its own circumstances. Page 347
 5. A party who neglects to bid in consequence of the auctioneer declaring that a person may open the biddings, if he comes within eight days after the report, cannot allege surprise as a ground for opening the biddings, if he does not come within that time. Ibid.
 6. After the decree, an order cannot be made on motion, to restrain the setting up of outstanding terms. 391
 7. The Court will not under the statute 56 G.3. c.60., order, on petition, a re-transfer of unclaimed stock that has been transferred to the sinking fund, when the title is disputed. 397
 8. An appeal may be prosecuted in *forma pauperis*. 402
 9. On reference to appoint a manager of an estate, the Master is to fix on the fittest person, without regard to who may propose him. 436
 10. A person examined as a witness for the plaintiff, being afterwards made a defendant, and not being interested in the suit, his evidence may be read. 538
 11. The Master's report on a reference of title, will not be suspended, to wait the decision of a suit commenced against the vendor for the recovery of part of the estate, but the two suits may be heard together. 539
 12. The guardian of an infant defendant, being a co-defendant, and putting in a joint answer, need only sign it once. Page 553
See INJUNCTION, 1. 5. — VENDOR AND PURCHASER, 1, 2.
- PRESUMPTION.
- See LENGTH OF TIME, 4, 5, 6.
- PROMISSORY NOTE.
- See BANKRUPT, 3. — INDORSEMENT, 1, 2.
- PROVISO.
- As to the effect of a proviso expressed to be "by way of declaration, and not of covenant." Qu. 510
-
- QUALIFICATION.
- See FRAUD.
-
- RECEIVER.
- See MORTGAGE, 1. 5. — PRACTICE, 1. 9.
- REMAINDER.
- See DEED, 1, 2, 3, 4. 7.
-
- SALE.
- See PRACTICE, 4, 5.
- SCHOOL.
- See GRAMMAR SCHOOL.
- SHIP.
- See INJUNCTION, 4.
Q q 2

SOCIETY.

A voluntary society for insurance, by way of mutual guarantee, is or is not illegal, according as the shares of the money laid up are or are not transferrable generally to persons not members. *Page* 503
See INJUNCTION, 6, 7.

SOLICITOR AND CLIENT.

1. Whether a solicitor's lien, for his costs on a fund in court is general, or is confined to the costs of the particular suit. *Qu.* 214
2. Solicitor having in his possession the instrument on which his client's right to the fund rests, he has a general lien on the fund. *Ibid.*
3. Solicitor's lien does not extend to debts that are not due to him in his professional character. 218

SPECIFIC PERFORMANCE.

1. Specific performance refused, of a contract improvidently entered into by ignorant persons. 413
2. A contract signed by one party only may be enforced by the other. *Semble.* 426
3. Where a contract is signed by one party only, the other by filing a bill for a specific performance, makes it binding on himself. 427
4. Where a contract has been signed by one party only, whether he is not at liberty to recede from it until the other party has done some act to bind himself. *Qu.* 428
See BARON AND FEME, 1, 2.

STATUTE OF FRAUDS.

See SPECIFIC PERFORMANCE, 2, 3, 4.

STATUTE OF LIMITATIONS.

See LENGTH OF TIME, 1, 2, 3.

STOPPAGE IN TRANSITU.

See INJUNCTION, 4. — JURISDICTION, 3.

TESTIMONY — BILL TO PERPETUATE.

The issue in tail cannot file a bill to perpetuate testimony, even in the case of an entail that cannot be barred. *Semble.* *Page* 439
See DIGNITY, 1, 2.

TITHES.

1. A book in the hand-writing of *A. B.*, purporting to contain accounts of tithes collected by him seventy years ago, cannot be received in evidence, without proof that *A. B.* was collector of tithes at that time. 464
2. In a suit for tithes by the lessee of an ecclesiastical corporation aggregate, to whom the rectory belonged, ancient documents in their possession, purporting to be accounts furnished by some of their members employed to collect the tithes, and appearing to be approved and settled, are admissible in evidence. *Ibid.*
3. The statutes of the body enjoining the appointment of collectors,

together with the internal evidence of the documents, and their coming out of the proper custody, held sufficient proof that the accounting parties were really collectors.

Page 464

4. Modus of 4*d.* for every milch cow and calf, and 3*d.* for every heifer and calf, in lieu of tithe of calves and milk, bad. *Ibid.*

5. Modus of 3*d.* for every hogahead of cyder, and 1*d.* for fruit, in lieu of tithe of apples, pears, and other fruit, bad. *Ibid.*

6. It is the duty of a court of equity to decree tithes in kind, when satisfied that the modus set up is either bad in law, or that it has not immemorially existed. *Ibid.*

7. As to the principle on which entries in a rector's books are admitted as evidence for his successors. *Qu.* 478

8. Entries of tithes received in the books of an ecclesiastical corporation aggregate entitled to a rectory, are evidence for their successors. *Ibid.*

9. Whether entries in the books of a lay impropriator in fee, of tithes received, are evidence for those claiming under him. *Ibid.*

10. The union of articles distinctly titheable in one modus objectionable. 483

11. Lands which were held discharged of tithes, before time of memory, by one of the alien priories, and coming to the Crown on their suppression, were granted to lay persons, and by them to one

of the greater monasteries, in whose hands they remained till the dissolution, are no longer exempt from payment of tithes.

Page 513

12. A custom in a part of a hundred, exempting hedges and hedgerows, less than a rod in width, from tithes of wood and underwood, is bad. *Ibid.*

13. Not correct to plead, that by a custom used and approved in *P.*, and nineteen other parishes, no tithe of a particular kind was due or payable to the rector of *P.* 521

14. No custom *in non decimando*, can be good except for wood, and for a known ancient district, not less than a county or a hundred. 524

15. By the common law, all land equally charged with tithes; there can be no exemption inherent in the land. 528

16. Lands which were held discharged before time of memory, by one of the alien priories, and coming to the Crown on their suppression, were granted to one of the greater monasteries, in whose hands they remained till the dissolution, are no longer exempt. 534

17. Lands held discharged from tithes before time of memory, by one of the alien priories, coming to the Crown on their suppression, are no longer exempt. 536

VENDOR AND PURCHASER.

1. Purchaser of estates sold under a decree, discharged, on motion,

from his purchase, upon error in the decree being shewn, though the parties are proceeding to rectify it. *Page 287*

2. Whether he is entitled to his costs. *Qu. Ibid.*

3. The rule of compelling a purchaser to take the estate where a title is not made till after the contract, not to be extended. 289

See PRACTICE, l. 11. — SPECIFIC PERFORMANCE.

VICE CHANCELLOR.

See JURISDICTION, 4, 5, 6.

WILL.

See PRACTICE, 2.

WITNESS.

See PRACTICE, 10.

WOOD.

See TITHES, 12. 14.

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